5 Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In the Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION, and
GM DAEWOO AUTO & TECHNOLOGY CO.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's dismissal of a lawsuit, under the doctrine of international comity and based on the preclusive effect of a foreign judgment, is reviewable *de novo* or only for abuse of discretion.

2. Whether the doctrine of international comity may be invoked, based on a prior order of a foreign bankruptcy court approving a plan of reorganization for a foreign debtor, to bar a lawsuit in U.S. courts, where the precluded claims are asserted against parties *other* than the foreign debtor and could not have been brought in the foreign proceeding.

RULE 29.6 STATEMENT

Daewoo Motor America, Inc., has since changed its name to StarPoint USA, Inc. Ninety-five percent of its stock is held by Credit Managers Association in trust for, and for the benefit of, the thousands of holders of unsecured claims in petitioner's Chapter 11 proceeding. Credit Managers Association does business as CMA Business Credit Services, a mutual benefit association incorporated in California. Credit Managers Association is a privately held corporation, and is not owned by any publicly held corporation.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-47a) is reported at 459 F.3d 1249. The district court's order (*id.* at 48a-71a) is reported at 315 B.R. 148.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2006, and rehearing was denied on October 3, 2006 (App., *infra*, 74a-75a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case raises two recurring issues concerning the doctrine of international comity. Comity "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). The doctrine of comity arises in a variety of settings, including where litigation in a foreign forum (a) is merely a possibility, (b) is actually pending, or (c) has ended in judgment (in which case the American court is being asked either to enforce the judgment or to give it res judicata effect). See *Diorinou* v. *Mezitis*, 237 F.3d 133, 139-40 (2d Cir. 2001). This case involves the last situation. Specifically, it raises the question whether comity requires that an order approving a plan of reorganization for a foreign debtor in a foreign bankruptcy proceeding be given res judicata effect to bar the damages and other claims of a creditor against parties *other* than the foreign debtor, where such claims were not adjudicated – and could not even have been *raised* – in the foreign bankruptcy proceeding.

In upholding this expansive use of the comity doctrine, a panel of the Eleventh Circuit, with one judge disagreeing on this ground, has extended the principle of comity far beyond its traditional precincts. In so doing, the panel majority created a conflict with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987), which held that non-debtors (such as respondents) are *not* entitled, under comity principles, to use a foreign bankruptcy order "as a shield" against the claims of third parties (such as petitioner). Beyond that, the lower court's adoption of a deferential abuse-of-discretion standard of appellate review conflicts with the *de novo* standard adopted and applied by the Second Circuit. To resolve these conflicts, and clarify the recurring issues presented concerning the meaning and proper administration of the comity doctrine, further review is warranted.

A. Factual Background

This case arises out of the substantial destruction of the business of petitioner Daewoo Motor America ("Daewoo America") caused by the fraudulent representations and other tortious conduct of the respondents. Until 2002, Daewoo America, a U.S. corporation, was the exclusive United States distributor for certain vehicles, parts, accessories, and equipment manufactured by Daewoo Motor Co., Ltd. ("DWMC"), which at that time was Daewoo America's Korean parent company. Doc 144, Ex 7 – Pg 1-4. Daewoo America and DWMC were parties to a ten-year distributorship agreement executed in 1999 that was terminable only in limited circumstances (the "Distribution Agreement"). *Id.* at 2. From 1997 to 2001, Daewoo America grew from a fledgling company promoting and distributing these products into America's fastest-growing car company with over 500 franchised dealers. Doc 64 – Pg 5-7.

DWMC encountered financial difficulties and, on November 10, 2000, filed for court receivership and

reorganization under the Corporate Recovery Act of Korea in the Inchon District Court in South Korea ("Korean Reorganization Court"). Doc 64 – Pg 7; App., *infra*, 51a. Following his appointment, DWMC's receiver adopted the Distribution Agreement under Korean law by continuing to perform (selling more than $400 million worth of vehicles and parts to petitioner) and by receiving petitioner's performance. Doc 142 – Pg 28; Doc 144 – Pg 3. During DWMC's reorganization, the receiver also began acquisition negotiations with respondent General Motors Corp. ("GM"). Doc 64 – Pg 7. Throughout the negotiation process, GM repeatedly assured petitioner that GM's acquisition of DWMC's assets would not alter petitioner's exclusive distributorship. *Id.* at 9-11. Based on these representations, petitioner continued to invest in and expand its business, purchased additional vehicles from DWMC, entered into new dealer agreements, gave assurances to its dealers, and even offered the dealers enhanced sales incentives and warranty coverage. *Id.* at 10-11; Doc 144 – Pg 3.

But GM's representations proved to be false. On April 30, 2002, GM entered into an agreement – known as the Master Transaction Agreement ("MTA") – to acquire all of the assets, including the manufacturing facilities and brand name rights, of DWMC and to transfer those assets to a newly created entity, respondent GM Daewoo Auto & Technology Co. ("GMDAT"). Doc 64 – Pg 12. Pursuant to the MTA, GM and its affiliates, including respondent Suzuki Motor Corp. ("Suzuki"), held a two-thirds ownership stake in GMDAT. *Ibid.* Contrary to GM's repeated assurances, the MTA excluded petitioner from the acquisition, effectively cutting off petitioner's vehicle supply – and giving GM's designee the right to distribute identical vehicle models in petitioner's exclusive territory. *Id.* at 13-15.

In February 2003, GM and its affiliates, including Suzuki's U.S. subsidiary, respondent American Suzuki Motor Corp.

("American Suzuki"), announced their intention to begin selling identical vehicle models ("rebadged" as Suzukis and Chevrolets) in the United States. *Id.* at 14-15.

B. The Trial Court Proceedings

After the MTA was executed, the DWMC receiver threatened to terminate the Distribution Agreement. Faced with this threat, petitioner filed a voluntary petition under Chapter 11 of the U.S. Bankruptcy Code on May 16, 2002, in federal bankruptcy court in California. Doc 64 – Pg 13. That filing in turn triggered an automatic stay protecting petitioner's property rights under 11 U.S.C. § 362. At the time of petitioner's Chapter 11 filing, the property rights protected by the automatic stay included petitioner's rights under the Distribution Agreement.[1] Petitioner has thousands of U.S. creditors who have filed over $840 million in claims in the U.S. bankruptcy proceeding.[2]

Subsequent to petitioner's Chapter 11 filing, the Korean Reorganization Court on September 30, 2002 approved a plan of reorganization for DWMC and approved GM's purchase

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[1] See *Krystal Cadillac Oldsmobile GMC Truck, Inc.* v. *GM Corp.*, 142 F.3d 631, 637-38 (3d Cir. 1998) (order that effectively terminated debtor's franchise agreement violated Section 362(a)(3) and was not binding upon the bankruptcy court); *In re Computer Communications, Inc.*, 824 F.2d 725, 730-31 (9th Cir. 1987) (termination of contract violated stay). The automatic stay has extraterritorial effect and applies to foreign proceedings. See *In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998). Actions taken in violation of the automatic stay are void. *In re Gruntz*, 202 F.3d 1074, 1082 (9th Cir. 2000) (en banc).

[2] Pursuant to petitioner's reorganization plan, any recovery from this lawsuit will be transferred to Creditors Management Association, for distribution to holders of unsecured claims in petitioner's Chapter 11 proceeding. See page ii, *supra*.

agreement embodied in the MTA. App., *infra*, 54a; Doc 123, Ex 5-A – Pg 1-9.

On July 22, 2003, petitioner filed this action against respondents in the bankruptcy court in California. Doc 1 – Pg 1-24. In its amended complaint, Daewoo America advanced (1) claims against GM for fraud, tortious interference with contract, tortious interference with prospective economic advantage, and aiding and abetting breach of fiduciary duty; (2) a claim against GMDAT for successor liability; and (3) claims against all respondents for violating various California, Florida, and Massachusetts statutes, for unauthorized post-Chapter 11 transfers, and for violating the automatic stay. Doc 64 – Pg 1-32.

In March 2004, the federal bankruptcy court dismissed certain of petitioner's claims, declined to dismiss certain others, and set forth a briefing schedule on respondents' comity defense. Doc 112 – Pg 2-3. Before the next scheduled hearing, however, the Judicial Panel on Multidistrict Litigation transferred the action to the U.S. District Court for the Middle District of Florida. Doc 107 – Pg 3-4.

In October 2004, the district court dismissed petitioner's amended complaint with prejudice based on the principle of international comity. App., *infra*, 48a-71a. It concluded that the Korean Reorganization Court's order approving the asset transfer and DWMC's reorganization plan precluded petitioner from pursuing the present litigation in the United States. *Id.* at 63a, 69a-71a. The district court reached that conclusion even though the Korean court's order made no mention of any of petitioner's claims against respondents or of petitioner's contractual rights under its agreement with DWMC. Denying a motion for clarification and reconsideration, the district court thereafter directed entry of judgment for respondents on all of petitioner's claims. App., *infra*, 72a-73a.

C. The Court of Appeals' Decision

1. A panel of the Eleventh Circuit affirmed. App., *infra*, 1a-19a. The panel majority acknowledged that under the governing treaty between the United States and Korea, "a Korean judgment is elevated to the status of a sister state judgment." *Id.* at 15a. And it recognized that a "sister state" (or federal) judgment receives only such preclusive effect as the principles of res judicata allow. *Id.* at 16a-18a. Notwithstanding the close tie between the comity issue in this case and res judicata analysis, the panel majority declined to apply to a comity ruling the *de novo* standard of appellate review that is applied to res judicata rulings by the Seventh and Ninth Circuits (as well as by the Eleventh Circuit itself). See, *e.g.*, *In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1284 (11th Cir. 2006); *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1295 (11th Cir. 2001); *Waid* v. *Merrill Area Public Schools*, 91 F.2d 857, 860 (7th Cir. 1996); *Clark* v. *Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). Instead, the majority declared without elaboration that "[t]he principle of international comity applied in this case is *an abstention doctrine*." App., *infra*, 10a (emphasis added). Because abstention rulings receive only abuse-of-discretion review in the Eleventh Circuit, the panel held that the district court's dismissal of petitioner's claims was likewise reviewable only for abuse of discretion. *Id.* at 10a (citing *Boyles* v. *Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000)).

Applying that deferential standard of review, the majority next concluded that the trial court had not abused its discretion in holding that the Korean Reorganization Court's order barred all of petitioner's claims against respondents. App., *infra*, 13a-19a. In particular, the majority squarely rejected petitioner's argument that "the scope of the comity granted to the order of the Korean court should not extend to [petitioner's] claims against the defendants because those claims *were not and could*

not have been raised in the Korean bankruptcy proceeding." *Id.* at 16a (emphasis added).[3] The court of appeals explained:

> The claims of Daewoo America arise out of the same nucleus of operative facts considered by the Korean court. The claims of Daewoo America are based on the Modified Reorganization Plan and MTA, which were approved by the Korean court. The validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court. The complaint

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[3] As petitioner demonstrated with evidence of foreign law in the form of expert affidavits (see Pet. C.A. Br. 9-11), there are two independent reasons why petitioner's claims against respondents could not have been raised and adjudicated in the Korean bankruptcy proceeding. First, those claims qualify as general civil claims under Korean law and, as such, they fall outside of the limited jurisdiction of the Korean Reorganization Court. See Supplemental Cho Decl. 12-13 (¶ 16). Second, even petitioner's claims *against the debtor, DWMC*, qualify as "common benefit" claims under Korean bankruptcy law. Korean law distinguishes between two very different types of claims against a company under reorganization: (1) reorganization claims; and (2) "common benefit" claims. Reorganization claims primarily consist of monetary claims against the debtor arising *prior to* the commencement of reorganization proceedings (which, as noted above, occurred on November 10, 2000). Common benefit claims, in contrast, generally arise *after* commencement of reorganization proceedings. Petitioner's claims *against DWMC* for breach of the Distribution Agreement (an agreement which the DWMC receiver adopted) arose *after* the reorganization proceedings began and are thus common benefit claims. Significantly, in Korea holders of common benefit claims do *not* participate in reorganization proceedings; instead, they must pursue their claims *outside* of the reorganization plan in ordinary (*i.e.*, non-bankruptcy) courts. Thus, although a reorganization plan under Korean law binds reorganization creditors and may alter their rights as holders of reorganization claims, it does not bind holders of common benefit claims and cannot alter their rights as such.

> of Daewoo America regarding the effect of the MTA should have been raised before the Korean court. Daewoo America cannot now collaterally attack that order by bringing claims against the recipients of the property transferred based on the approval by the Korean court.

App., *infra*, 16a. Because the panel majority assumed that all of petitioner's claims could have been raised in the Korean proceeding, it emphasized petitioner's notice of those proceedings and faulted petitioner for not raising its claims there. *Id.* at 6a-7a, 14a-15a. In concluding that *all* of petitioner's claims against the respondents were precluded by the Korean bankruptcy court's order, the panel majority also relied on the fact that some of those claims sought injunctive relief (and one claim requested that "the transfer be set aside"). *Id.* at 16a.

Finally, the panel majority sought to distinguish several cases that had refused to apply the doctrine of res judicata to give an order confirming a plan of reorganization in a U.S. bankruptcy proceeding claim-preclusive effect with regard to legal claims brought by one creditor in the reorganization proceeding against other creditors or non-debtor parties. The Eleventh Circuit's prior decision in *Piper Aircraft* was distinguishable, the panel majority explained, because there the "'facts underpinning'" the creditor's claims – all of which arose out of a failed agreement to reorganize the debtor – "'were not at issue in the confirmation proceeding.'" App., *infra*, 17a (quoting *Piper Aircraft*, 244 F.3d at 1297). In contrast, the court explained, "the facts underpinning [Daewoo America's] complaint * * * *were* at issue in the Korean proceeding because those facts *relate to* the approval of the Modified Reorganization Plan and the MTA." *Id.* at 17a (emphasis added). The panel majority also distinguished *La Preferida, Inc.* v. *Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900 (7th Cir. 1990), on the ground that it involved a prior consent judgment

(which is not entitled to collateral estoppel effect). App., *infra*, 17a.

2. Judge Tjoflat wrote a lengthy opinion concurring in the judgment, in which he disagreed with the majority's decision to uphold the dismissal of all of petitioner's claims on the basis of international comity. App., *infra*, 19a-47a. In Judge Tjoflat's view, "it is patently clear that the [panel majority], like the district court, rushed into * * * dismissing Daewoo America's Amended Complaint in its entirety when, in fact, the international comity doctrine has only limited application." *Id.* at 47a.

As Judge Tjoflat explained, "most of Daewoo America's claims solely concern the [respondents'] dealings with Daewoo America, separate and distinct from the transfer of [DWMC's] manufacturing assets to GM and its partners." App., *infra*, 19a. "For the vast majority of Daewoo America's claims, the proceedings before the Korean bankruptcy court serve as little more than a factual backdrop." *Ibid.* Judge Tjoflat specifically disagreed with the majority's assumption that "the validity of the MTA, the Korean bankruptcy court's orders, or the Korean bankruptcy proceedings" was in any way relevant to the questions underlying petitioner's claim, which were "whether GM's promise to make Daewoo America its United States distributor was intentionally untruthful" and "whether the [respondents] eliminated Daewoo America's vehicle supply with tortious or anticompetitive intent." *Id.* at 36a.

Judge Tjoflat also disagreed with – and criticized as "misleading" – the majority's reliance on petitioner's request for injunctive relief on some of its claims, noting that petitioner was also seeking "*damages* on *thirteen*" of its fourteen claims. App., *infra*, 27a n.8 (emphasis in original). "Awarding Daewoo America damages pursuant to its claims," Judge Tjoflat explained, "would do nothing to disturb GM's ownership interest in GMDAT, nor would it affect GMDAT's continued control of the Daewoo Korea Plants and other assets." *Ibid.*

Moreover, even as to Daewoo America's successor liability claim against GMDAT, Judge Tjoflat observed, it cannot be said that Daewoo America was "trying to upset the bankruptcy order." App., *infra*, 33a n.15. "Far from attacking the validity of the Korean bankruptcy court's proceedings and the resultant asset sale," that claim "is simply seeking to enforce the bankruptcy court's order." *Id.* at 33a; see also *id.* at 33a n.15 (noting that the successor liability claim presupposed that "GMDAT has an obligation to Daewoo America that survives bankruptcy and is attempting to enforce it"); *id.* at 36a (noting that this claim "is entirely dependent on the validity of the Korean bankruptcy proceedings").

In sum, Judge Tjoflat noted, "this dispute simply is not part of the Korean bankruptcy, and granting international comity to the [Korean Reorganization Court]'s orders does little to resolve it." *Id.* at 20a. Because Judge Tjoflat ultimately concluded that petitioner's remaining claims were insufficient as a matter of law, however, he concurred in the court's disposition of the appeal. *Id.* at 47a.[4]

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[4] Although Judge Tjoflat ultimately concurred in the judgment, there is good reason to believe that the result would be different if this case were remanded to the Eleventh Circuit following a decision by this Court in petitioner's favor on the issues presented. First, the panel majority declined to adopt Judge Tjoflat's alternative rationale, and there is no reason to believe that it would adopt all of his conclusions if this Court disapproves the majority's comity ruling. Second, if and when there is a remand to the panel, petitioner will have an opportunity to explain that certain of Judge Tjoflat's alternative grounds are unsustainable. For example, Judge Tjoflat concluded that petitioner's fraud claim against GM should be dismissed because, in his view, petitioner cannot prove that GM's misrepresentations caused it any harm. App., *infra*, 45a-46a. But first, GM never made that argument below, petitioner never had a chance to address it, and the district court did not consider it; that rationale accordingly is unavailable as a basis for affirming dismissal of the complaint. What

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to make sure that the doctrine of international comity has a uniform and sensible meaning. In "today's highly interdependent commercial world," *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-65 (2004), featuring the globalization of business and a corresponding rise in transnational litigation in American courts, the comity doctrine has assumed great importance. Further review would permit the Court to resolve conflicts in the circuits over the scope of the comity doctrine and over the proper division of authority between trial and appellate courts in administering this important principle, which implicates the Nation's relations with other countries.

This case is especially deserving of the Court's attention because it involves the application of the comity doctrine to consecutive foreign and domestic bankruptcy proceedings. As the decision below amply demonstrates, this setting presents special difficulties for generalist federal judges (who must grapple not only with unfamiliar bankruptcy-law concepts but also with unfamiliar issues of foreign law and unfamiliar foreign proceedings). Given "the exponential growth of multinational or transnational corporate enterprise," Eric W. Orts, *The Future of Enterprise Organization*, 96 MICH. L. REV. 1947, 1962-63 (1998), and the globalization of capital markets, it is hardly

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is more, this conclusion reflects a truncated understanding of the actual fraud claim, the entirety of which has never been reviewed. GM's misrepresentations led petitioner to continue investing in and expanding its business, see page 3, *supra*, and GM's exclusion of petitioner from the MTA saddled it with inventory which had lost significant value and forced it to buy back the vehicles it had sold to dealers. Doc 64 – Pg 13. In short, given the opportunity to return to the Eleventh Circuit following a favorable ruling, petitioner has every hope of persuading the court to reverse the dismissal of the action.

surprising that American courts are facing issues like those presented in this case with increasing frequency.

Congress has recognized this phenomenon and taken steps to provide greater certainty, predictability and uniformity to the businesses, investors, creditors, and consumers that might find themselves willing or unwilling participants in foreign insolvency regimes. Toward that end, Congress recently added an additional chapter – Chapter 15, 11 U.S.C. §§ 1501-1532 – to the Bankruptcy Code. See, *e.g.*, 11 U.S.C. § 1501(a) (explaining ways that Chapter 15 is intended to "provide effective mechanisms for dealing with cases of cross-border insolvency"). Chapter 15, however, addresses only *concurrent* U.S. and foreign insolvency proceedings for the *same* debtor. It does not address how domestic subsidiaries and their creditors are affected by orders entered in foreign insolvency cases involving their parent entities. That question is ordinarily answered through resort to the judge-made doctrine of international comity. This Court can provide greater clarity here by addressing the effect of a foreign parent's insolvency proceeding on a U.S. subsidiary's claims against parties *other than* the foreign parent. More generally, further review would allow the Court to provide much-needed clarification of how the comity doctrine should be applied to the important and recurring phenomenon of foreign bankruptcy proceedings.

In the decision below, a panel of the Eleventh Circuit has stretched the boundaries of international comity far beyond traditional limits, extending greater preclusive effect to a foreign judgment than is available to a domestic judgment under the principles of res judicata. In an unprecedented expansion of the comity doctrine, the panel ruled that an order of a foreign court approving a plan of reorganization for a foreign debtor barred not only claims against the foreign debtor but also claims against *parties other than the debtor* that *could not have been adjudicated* by the foreign bankruptcy court. Thus, the majority affirmed the dismissal of all of the claims brought by petitioner

Daewoo America against the four respondents, even though none was the debtor in the foreign insolvency proceeding to which the district court extended comity. And it reached that result even though, as Judge Tjoflat correctly pointed out, petitioner's damages claims were based in large measure on conduct of respondents extrinsic to the Korean bankruptcy proceeding – and success on those damages claims would in no way have called into question the Korean court's orders.

The panel majority's unwarranted expansion of the comity doctrine was accomplished in two separate steps. First, it applied the deferential abuse-of-discretion standard to the district court's blanket application of comity and dismissal of petitioner's claims, thereby elevating the status of a foreign judgment *above* that of a domestic judgment (the res judicata effect of which would have been reviewed *de novo* on appeal). In adopting this deferential standard of review, the panel went into conflict with the Second Circuit's well-reasoned decision in *Diorinou* v. *Mezitis*, 237 F.3d 133 (2d Cir. 2001), which adopted and applied *de novo* review for comity rulings of the kind involved here. The panel majority's deference to the district court effectively shut the courthouse doors to a U.S. debtor and its thousands of creditors, who hold over $840 million in claims. Yet, the panel majority offered no reason – other than a mistaken analogy to abstention cases – for affording such deference to the district court's application of comity to a foreign judgment.

The panel majority further elevated the status of the foreign reorganization court's order by extending comity to preclude claims brought by a creditor in the foreign proceeding against *non-debtor* parties. The majority's holding squarely conflicts with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987), which held that non-debtors are *not* entitled to invoke comity principles "as a shield" against the claims of third parties. As the Third Circuit recognized, to hold otherwise would be to

disregard the fundamental reasons for affording deference to a foreign reorganization court's order approving a plan of reorganization – namely, to allow a foreign debtor's assets to be distributed to its creditors fairly and ratably and to protect the foreign debtor by ensuring that claims that were discharged in the foreign proceeding cannot be reasserted against the foreign debtor.

But the panel decision strays even further from traditional reasons for comity and ordinary principles of res judicata: It sustained the dismissal even of claims that *could not have been* adjudicated in the Korean bankruptcy proceeding. See RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982) (claim preclusion does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts"). In sharp contrast, this Court – and other courts of appeals – have consistently refused to apply res judicata to bar claims that could not have been raised in a prior proceeding. See, *e.g.*, *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985); *Brody* v. *Village of Port Chester*, 345 F.3d 103, 114 (2d Cir. 2003); *Waid* v. *Merrill Area Public Schools*, 91 F.2d 857, 866 (7th Cir. 1996); *Clark* v. *Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992); see also *In re Birting Fisheries, Inc.*, 300 B.R. 489 (B.A.P. 9th Cir. 2003). The panel's emphasis on petitioner's actual notice of the Korean bankruptcy proceeding is beside the point because the claims at issue here simply could not have been raised and adjudicated in the foreign bankruptcy proceeding. To resolve these conflicts, clarify the comity doctrine, and correct the Eleventh Circuit's manifest errors, further review is warranted.

I. This Court Should Resolve The Conflicts In The Lower Courts Over The Proper Standard Of Appellate Review

The panel majority's threshold determination was that the district court's dismissal of all of petitioner's claims based on comity was reviewable only for an abuse of discretion. App., *infra*, 10a. The only explanation offered by the majority for adopting that standard of review – and rejecting the *de novo* standard urged by petitioner – was its statement that "[t]he principle of international comity applied in this case is an abstention doctrine" (and abstention rulings are reviewed for abuse of discretion). *Ibid.* As we explain below, the Eleventh Circuit's holding directly conflicts with the Second Circuit's well-reasoned decision in *Diorinou* v. *Mezitis*, 237 F.3d 133 (2d Cir. 2001), which applied *de novo* review and rejected the abuse-of-discretion standard in an identical setting. This Court should grant review of the first issue presented to resolve this direct conflict in the circuits, bring greater clarity to an issue that has spawned confusion in the lower courts, and correct the error below.

A. The leading case on standards of review relating to the doctrine of international comity is the Second Circuit's decision in *Diorinou*. See 2 VED NANDA & DAVID PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS ¶ 15:8 (2006) (in section dealing with the "standard of review" for comity determinations, summarizing the *Diorinou* framework). In *Diorinou*, Judge Newman conducted a detailed review of the relevant case law and explained that the proper standard of appellate review of a comity ruling depends on the nature of the district court decision under review. 237 F.3d at 138-40. He proceeded to identify "three different contexts" in which "United States courts have said that they are deferring to foreign proceedings or adjudications as a matter of 'comity.'" *Id.* at 139. *First*, "domestic court[s]" are sometimes asked to refrain from "proceed[ing] with litigation within [their] jurisdiction because

of the *pendency or availability* of litigation in a foreign forum." *Ibid.* (emphasis added) (citing cases). Because a district court declining to adjudicate a lawsuit in this circumstance based on comity is "invoking a doctrine akin to *forum non conveniens*," Judge Newman explained, and because *forum non conveniens* rulings are reviewed on appeal for abuse of discretion, "the same standard of review has been held to govern a similar abstention" based on comity "in favor of foreign proceedings" that are either pending or yet to be initiated. *Ibid.*

"[A] *second* context," Judge Newman explained, is when "a domestic court considers whether *to enforce a foreign judgment*." 237 F.3d at 139 (emphasis added) (reviewing cases). Here, in contrast to the first setting, the foreign proceeding has ended and a final judgment has been entered. As Judge Newman explained, "domestic courts have not clearly articulated the standard of appellate review of the decision whether to enforce the foreign judgment, but appear to be applying a *de novo* standard * * * just as they would on review of a judgment in an action to enforce a judgment of a court within the United States." *Ibid.*; accord *Kwongyuen Hangkee Co.* v. *Starr Fireworks, Inc.*, 634 N.W.2d 95, 96 (S.D. 2001) (application of international comity in action to enforce a foreign judgment "presents a question of law, which is reviewed de novo"). In addition to citing illustrative decisions of the courts of appeals, Judge Newman cited this Court's decision in *Hilton* v. *Guyot*, 159 U.S. 113 (1895), as an example of *de novo* review being applied to this type of comity-based ruling.

Finally, Judge Newman identified "a *third* context," illustrated by the facts of *Diorinou* itself, where "a domestic court considers whether to *accept the adjudication* of a foreign tribunal *on a cause of action or a particular issue*." 237 F.3d at 139 (emphasis added) (citing cases). Here too, the foreign proceeding is not merely pending or anticipated but has resulted in an adjudication, and the application of the comity doctrine is thus entirely "retrospective." In this third context, "as in the

enforcement of foreign judgments context," Judge Newman explained,

> appellate courts have not explicitly articulated the standard of review, but we believe the standard is *de novo* review, * * * just as it would be on review of a judgment of a domestic court based on *res judicata* or collateral estoppel.

Id. at 140 (citing *SEC* v. *Monarch Funding Corp.*, 192 F.2d 295, 303 (2d Cir. 1999) (applying *de novo* review to district court's ruling based on collateral estoppel)). The *Diorinou* panel then proceeded to review *de novo* the lower court's decision.

This case falls squarely into the third category identified by Judge Newman. Respondents successfully obtained the dismissal of all of petitioner's claims based on the res judicata effect of the Korean bankruptcy proceedings and orders. Those proceedings have been completed and reduced to a final judgment. It is therefore beyond dispute that, had this appeal been heard by the Second Circuit, the court of appeals would have applied a *de novo* standard of review. The Eleventh Circuit's adoption of an abuse-of-discretion standard of review directly conflicts with the holding of *Diorinou*.[5]

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[5] In a more recent case, the Second Circuit has made clear that even in the first context identified in *Diorinou*, when reviewing a lower court's "decision to abstain from exercising jurisdiction" based on comity because of a pending or ongoing foreign proceeding, it will apply a "more rigorous" form of abuse-of-discretion review that is of "little practical distinction" from *de novo* review. *Royal and Sun Alliance Ins. Co. of Canada* v. *Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006). The Second Circuit applies this "more rigorous" standard to the review of abstention rulings generally because abstention is "an exception to a court's normal duty to adjudicate a controversy properly before it." *Hachamovitch* v. *DeBuono*, 159 F.3d 687 (2d Cir. 1998) (internal quotations omitted). On the other hand,

Nor is this all. The Second Circuit in *Diorinou* took pains to preserve parity between (a) the way the doctrine of international comity is applied to *foreign* judgments and proceedings, and (b) the legal standards that govern *domestic* judgments or proceedings. The reason is straightforward. The whole point of the comity doctrine is to accord *equivalent* – not preferential – treatment to foreign judgments and proceedings in comparison to the treatment accorded to domestic judgments and adjudications. As the panel majority acknowledged in this case, that bedrock principle is embodied in the Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, which provides that "a Korean judgment is elevated to the status of a sister state judgment." App., *infra*, 15a (citing 8 U.S.T. 2217); see also *Vagenas* v. *Continental Gin Co.*, 988 F.2d 104, 106 (11th Cir. 1993). By adopting a more deferential standard of review than it would apply to a res judicata ruling concerning a prior *domestic* judgment, see *In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1284 (11th Cir. 2006) (*de novo* review); *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1295 (11th Cir. 2001) (same); see also *Int'l Transactions, Ltd.* v. *Embotelladora Agral Regiomontana, S.A. de C.V.*, 347 F.3d 589, 593 (5th Cir. 2003), the Eleventh Circuit has destroyed the parity that is at the heart of the comity doctrine.

Although this square conflict between two circuits that are important fora for transnational litigation is reason enough to grant review of the first issue presented, it is worth noting that there is considerable confusion in the lower courts over the

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the Second Circuit also recognizes "foreign bankruptcy proceedings" as a "category of foreign litigation" in which abstention in favor of parallel proceedings is usually necessary if maintenance of the plaintiff's claims would threaten the "equitable and orderly disposition of the debtor's property." *Royal and Sun Alliance Ins. Co.*, 466 F.3d at 93 (internal citations omitted). No such threat – or parallel proceedings – exists in this case.

proper standard of review. Some appellate courts have followed Judge Newman's lead in *Diorinou* by adopting a *de novo* standard of review in this setting. See, *e.g.*, *Velez* v. *Mitsak*, 89 S.W.3d 73, 79 (Tex. App. 2002) (reviewing the trial court's determination whether to give deference to an earlier Hague Convention petition *de novo*, citing *Diorinou*); *In the Interest of T.J.*, No. 12-03-00331-CV, 2005 Tex. App. LEXIS 1927, at *15 (March 14, 2005) (same) (citing *Velez*). In contrast, the Supreme Court of California has adopted the abuse-of-discretion standard for reviewing a lower court's decision whether to grant comity to a foreign judgment. See *In re Stephanie M.*, 867 P.2d 706, 716 (Cal. 1994).

The Fifth and Ninth Circuits, moreover, have endorsed approaches to the standard-of-review issue that differ from the approaches used in the Second and Eleventh Circuits. In *Overseas Inns S.A. P.A.* v. *United States*, 911 F.2d 1146 (5th Cir. 1990), the court of appeals suggested that appellate review of whether to grant comity to a foreign judgment *on a motion for summary judgment* is subject to the same *de novo* standard that applies *to other summary judgment rulings*. *Id.* at 1148 n.4. Although the Fifth Circuit also stated that it was "not necessary to decide the issue" in that case, its suggestion that the appropriate standard of review *turns on the procedural setting* of the lower court's ruling represents a manifestly different approach to the issue. Here, of course, petitioner's claims were dismissed by the district court. Like other circuits, the Eleventh Circuit "'ordinarily review[s] the grant of motions to dismiss or summary judgment *de novo*'" (App., *infra*, 10a (quoting *Parks* v. *City of Warner Robins, Georgia*, 43 F.3d 609, 612-13 (11th Cir. 1995)). Thus, if the panel had followed the Fifth Circuit's suggested approach in *Overseas Inn*, it would have applied a *de novo* standard of review in this case as well.

In a subsequent case, however, the Fifth Circuit, without citing *Overseas Inn*, stated that comity rulings are "reviewed for abuse of discretion." *International Transactions, Ltd.* v.

Embotelleradora Agral Regiomontana, S.A. de C.V., 347 F.3d 589, 593 (5th Cir. 2003). Thus, the state of the law in the Fifth Circuit is less than clear. The Fifth Circuit's decisions reflect the same confusion that is apparent when comparing the decisions in different circuits.

The Ninth Circuit has suggested that the standard of review may hinge not on the progress or timing of the foreign proceedings (as in *Diorinou*), but rather on the procedural posture of the ruling below as well as on the *legal basis* for the comity determination. In *Bird* v. *Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir. 2001), the court of appeals explained that "[b]ecause the decision to recognize a foreign judgment is discretionary, not mandatory, * * * some federal courts of appeals have concluded that a district court's decision to recognize a foreign judgment should be reviewed for abuse of discretion." *Id.* at 1140 (citing, *e.g.*, *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987)). But it went on to say that *de novo* review was appropriate because the decision to extend comity turned on whether the foreign judgment had been entered without adequate due process safeguards, and "we review de novo claims of due process violations." *Ibid.* *De novo* review was also "required," the Ninth Circuit explained, because it was "reviewing a district court's summary judgment" ruling. *Ibid.*

B. The standard of review applicable to a trial court's determination of whether to give effect to a foreign judgment based on international comity is a fundamental question that affects a growing number of cases as multinational companies increasingly dominate the global economy. The issue arises at the threshold of every appeal taken of a ruling in which the comity doctrine has been invoked as a basis for giving res judicata effect to a foreign judgment. Moreover, the issue is not limited to appeals taken to the courts of appeals. It also arises as a threshold matter when a district court reviews a bankruptcy court's determination whether to enforce a foreign judgment

based on comity. See, *e.g.*, *In re Travelstead*, 227 B.R. 638, 656 (D. Md. 1998) (reviewing for abuse of discretion bankruptcy court's decision that comity did not require yielding to Dutch court orders).

C. Review of the first issue presented is also warranted because the decision of the Eleventh Circuit is wrong. The Second Circuit's decision in *Diorinou* sets forth the correct framework for analyzing the standard-of-review question. This case involves the invocation of international comity as a basis for according res judicata effect to the orders of the Korean bankruptcy court. As Judge Newman correctly explained, that kind of retrospective use of the comity doctrine is properly subject to *de novo* review on appeal. It raises legal issues, not issues that are fundamentally discretionary in nature.

The *de novo* standard of review is also preferable because it preserves the parity principle animating the doctrine of international comity. *De novo* review applies to res judicata rulings concerning *domestic* judgments; there is no good reason why *foreign* judgments should receive different treatment.[6]

Finally, we note that use of an abuse-of-discretion standard of review is particularly inappropriate where, as here, a trial court has applied the comity doctrine to *dismiss* the lawsuit of

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[6] The Eleventh Circuit's suggestion that "[t]he principle of international comity applied in this case is *an abstention doctrine*" (App., *infra*, 10a (emphasis added)) is manifestly incorrect. As this Court has recognized, the "principles of equity, comity, and federalism" that underlie *Younger* abstention "have little force in the absence of a pending state proceeding." *Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974) (internal quotations omitted). Equally inapposite, by definition, is *Pullman* abstention once unsettled questions of state law have been resolved by a final judgment. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 501 (1941). The use of comity by the district court thus bears no resemblance to abstention.

a U.S. litigant based on a foreign judgment. When a district court invokes comity as a basis for closing the courthouse doors, the argument for heightened appellate review is especially strong – particularly where, as here, it is not only petitioner's claims that have been extinguished (but also the claims of petitioner's many creditors in the U.S. bankruptcy proceeding that will be adversely affected by the trial court's dismissal). Whatever merit a deferential standard of review has when a motion to dismiss based on comity is *denied*, it has little to recommend it when comity is used to shut the courthouse doors entirely to a U.S. litigant. See note 5, *supra* (explaining that the Second Circuit applies a "more rigorous" standard of review even to rulings based on abstention because such rulings are in derogation of the duty of federal courts to exercise jurisdiction granted them by Congress). For all of these reasons, this Court should grant review of the first question presented.

II. The Court Of Appeals' Unwarranted Expansion Of The Scope Of The Comity Doctrine Also Deserves Review

The panel majority extended the principle of comity far beyond its traditional scope in two compounding respects. First, the court held that a foreign order approving a foreign debtor's plan of reorganization precluded all of petitioner's claims against *non-debtor* parties. In this respect, the Eleventh Circuit's decision squarely conflicts with a decision of the Third Circuit. Beyond that, the court sustained the application of comity to bar claims that were not, and could not have been, raised in the foreign proceeding. These dramatic expansions of the doctrine of comity warrant this Court's review.

A. To place this issue in context, it must be remembered that the fundamental purpose of the bankruptcy laws is to protect the *debtor* and its property – not to protect third parties who are not the debtors in the bankruptcy proceeding from claims against them. See, *e.g.*, *In re Jet Fla. Sys., Inc.*, 883 F.2d 970, 975 (11th Cir. 1989); *In re Lowenschuss*, 67 F.3d 1394,

1401 (9th Cir. 1995). This principle is not unique to bankruptcy law in the United States; the Corporate Recovery Act of Korea ("CRA") is to the same effect. See CRA Art. 241 (providing that, upon plan approval, "the *company* shall be exempted" from specified liabilities) (emphasis added) (Doc 126, Ex 33-B).

Consistent with this overarching purpose of bankruptcy law, the comity doctrine has historically and consistently been applied only to claims against *the debtor or the debtor's property*. For example, in *Canada Southern Railway Co.* v. *Gebhard*, 109 U.S. 527, 539 (1883), this Court held that claims of U.S. creditors against a Canadian debtor were barred by the debtor's discharge in a Canadian insolvency proceeding. In *Victrix S.S. Co.* v. *Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987), the court of appeals, in extending comity to a Swedish bankruptcy proceeding with respect to a claim against the Swedish *debtor*, explained the rationale for such deference:

> The equitable and orderly distribution of *a debtor's* property *requires assembling all claims against the limited assets in a single proceeding*; if all creditors could not be bound, a plan of reorganization would fail.

Id. at 713-14 (emphasis added). This theme of assembling in one proceeding all claims against the *foreign debtor* and *its* assets permeates the case law addressing the application of comity to foreign insolvency proceedings.[7]

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[7] See, *e.g.*, *Finanz AG Zurich* v. *Banco Economico S.A.*, 192 F.3d 240 (2d Cir. 1999) (barring suit on claims against Brazilian guarantor that was subject to Brazilian liquidation proceeding); *Haarhuis* v. *Kunnan Enters., Ltd.*, 177 F.3d 1007 (D.C. Cir. 1999) (barring claims against Taiwanese corporation subject to Taiwanese insolvency proceeding); *Cunard S.S. Co.* v. *Salen Reefer Servs. AB*, 773 F.2d 452 (2d Cir. 1985) (holding that English creditor could not assert claims in New York against Swedish debtor subject to Swedish bankruptcy).

This rationale, however, has no application here. Respondents are not the debtors in a foreign bankruptcy. The assertion of petitioner's claims against the respondents would not affect the equitable, orderly and ratable distribution of DWMC's property to DWMC's creditors.[8] Nevertheless, the district court applied comity to the Korean Reorganization Court's plan approval order to bar claims against parties *other* than the foreign debtor, brought by a *different debtor* with a *different* set of creditors in a U.S. bankruptcy case. Such an unprecedented extension of comity was highly prejudicial to the interests of the creditors who are the real parties in interest in the U.S. proceeding – thousands of creditors of Daewoo America have filed over $840 million in claims against Daewoo America.[9]

Remarkably, the Eleventh Circuit did not even address the prejudice to petitioner's U.S. creditors in affirming this unprecedented expansion of comity. The Eleventh Circuit thus disregarded a critical component of the doctrine of international comity, as articulated by this Court over a century ago, when this Court instructed that judges applying the comity doctrine must "hav[e] due regard both to international duty and convenience, *and to the rights of its own citizens, or of other persons who are under the protection of its laws*." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895) (emphasis added).

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[8] Indeed, the MTA specifically contemplated the possibility of a suit such as this one by petitioner against the respondents and indemnified the respondents against such suit. See note 12, *infra*.

[9] While this appeal was pending, the district court issued an opinion dismissing on comity grounds all of the complaints filed by Daewoo automobile dealers against respondents GM, GMDAT, and American Suzuki seeking to recover for financial losses the dealers suffered following the implementation of the MTA. See Order, *In re Daewoo Motor Co. Ltd., Dealership Litigation*, MDL-1510, 2005 U.S. Dist. LEXIS 43197, at *15 (M.D. Fla. Jan. 6, 2005).

B. The panel majority's extension of comity to preclude claims against parties *other* than the foreign debtor directly conflicts with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260 (3d Cir. 1987). In that case, Remington Rand Corp. ("Remington U.S.") brought an adversary action in bankruptcy against two affiliated corporations, Business Systems Inc., B.V. ("BSI B.V.") and BSI Office Equipment, Inc., ("BSI U.S."). *Id.* at 1261. Remington U.S. alleged that BSI B.V. and BSI U.S. had misappropriated trade secrets on how to produce an electric typewriter that Remington U.S. had originally licensed to its Dutch subsidiary, Remington Rand B.V. ("Remington B.V."), to use in manufacturing the typewriters at its Dutch plant. *Id.* at 1262. After Remington B.V. entered into the Dutch equivalent of reorganization under Chapter 11 of the U.S. Bankruptcy Code, the Dutch trustees sold the Dutch plant, along with the know-how to produce the typewriter, to BSI B.V. *Ibid.* Remington U.S. claimed that BSI B.V. misappropriated its trade secrets when it bought the Dutch plant from Remington B.V., and subsequently filed an amended complaint that named BSI U.S. as an additional defendant. *Ibid.* The district court entered judgment against BSI B.V. and BSI U.S. *Id.* at 1263.

On appeal, BSI B.V. and BSI U.S. argued that the Dutch court's approval of the Remington B.V. trustees' sale to BSI B.V. of the trade secrets precluded Remington U.S.'s claims against them. *Id.* at 1265. The Third Circuit disagreed, holding, *inter alia*, that non-debtors in the foreign proceeding were not entitled to invoke comity principles designed to protect the foreign debtor. As the court explained, Remington B.V.'s bankruptcy "cannot be used as a shield" by BSI B.V. and BSI U.S., because it would not serve the rationale of granting comity, namely "to allow a foreign debtor's assets to be distributed equitably." *Id.* at 1267.

Other courts have reached the same conclusion. See, *e.g.*, *BDL International* v. *Sodetal USA, Inc.*, 377 F. Supp. 2d 518

(D. S.C. 2005) (rejecting defendants' arguments that plaintiff's complaint should be dismissed due to contemporaneous French proceedings because "[t]he French action only concerns the assets of the debtor Thalatrans and will not include issues important here, such as whether [defendant Sodetal USA, Inc.] is liable as consignee under the contract"); *Philadelphia Gear Corp.* v. *Philadelphia Gear de Mexico, S.A.*, No. Civ. A. No. 91-6250, 1995 U.S. Dist. LEXIS 15629, at *8 (E.D. Pa. Oct. 25, 1995) (Mexican bankruptcy of defendant not entitled to international comity because domestic action brought by plaintiff did not seek "any relief compelling [defendant] to part with property which would interfere with the Mexican Bankruptcy Court's equitable distribution of [defendant's] assets.").

The panel majority took a sharply conflicting path. It allowed respondents, none of which was the debtor in the Korean proceeding, to use DWMC's insolvency proceeding as a shield against petitioner's claims for damages and other relief. As in *Remington Rand*, the dismissal of petitioner's claims did nothing to serve the purpose of extending comity "[i]n matters concerning bankruptcy" – to "enable[] the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." App., *infra*, 14a (internal quotation marks omitted). If allowed to proceed, petitioner's claims against respondents would *not* have disturbed the Korean Reorganization Court's distribution of *DWMC*'s assets. As Judge Tjoflat correctly noted, petitioner sought damages on thirteen out of fourteen claims, and "[a]warding Daewoo America damages pursuant to its claims * * * would *do nothing to disturb* GM's ownership interest in GMDAT, nor would it affect GMDAT's continued control of the Daewoo Korea Plants and other assets." App., *infra*, 27a n.8 (emphasis added).

Nor is this all. As Judge Tjoflat pointed out, Daewoo America's successor liability claim was "directed at GMDAT,

not [DWMC]. Far from attacking the validity of the Korean bankruptcy court's proceedings and the resultant asset sale, [Daewoo America's claim for successor liability] is simply seeking to *enforce* the bankruptcy court's order." App., *infra*, 33a (emphasis added). Thus, the panel majority was simply wrong in characterizing petitioner's claims as seeking "to redistribute the assets that were transferred with the approval of the Korean court." *Id.* at 18a.

C. The panel majority then stretched the doctrine of international comity one step further: it granted the foreign judgment preclusive effect even as to claims that the foreign court did not have authority to adjudicate. It is one of the "most basic principles of res judicata" that a party does not have to sue another "in a forum where it could not receive full relief." *Atlanta Retail*, 456 F.3d at 1285. It follows that a previous proceeding cannot be used as a bar to claims that could not have been adjudicated there. See RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982).

The Eleventh Circuit's holding flatly contravenes this bedrock principle. It is also in serious tension if not outright conflict with this Court's decision in *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985), and with the many courts of appeals' decisions that have articulated and applied this principle in non-bankruptcy cases. In *Marrese*, this Court held that res judicata cannot bar a federal antitrust claim that was not within the jurisdiction of the state court that adjudicated the plaintiff's other claims, despite the fact that the claims were all based on the same set of facts. *Id.* at 382 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c)). To the same effect is the Second Circuit's decision in *Brody* v. *Village of Port Chester*, 345 F.3d 103 (2d Cir. 2003), that a landowner's constitutional challenges to the procedures used by the Village to condemn his property were not precluded on res judicata grounds based on the condemnation proceedings themselves because those challenges, by statute, fell under the exclusive

jurisdiction of the appellate division. Res judicata, the Second Circuit explained, "will not apply * * * where the initial forum did not have the power to award the full measure of relief sought in the later litigation." *Id.* at 114 (internal quotation marks omitted).[10]

In this case, the Eleventh Circuit expanded the claim-preclusive effect of the Korean Reorganization Court's order beyond matters that were within the foreign court's jurisdiction, and barred petitioner's claims against entities that were not the debtor, even though petitioner's claims were not, and could not have been, addressed by the Korean court's order approving the reorganization plan for DWMC. As explained in note 3, *supra*, although the Korean Reorganization Court had the ability to adjudicate and discharge claims against the debtor, DWMC, that arose *prior* to the commencement of DWMC's reorganization proceedings, it lacked the authority to adjudicate claims brought against *non-debtor parties* that arose *after* the commencement of the reorganization proceedings. Many of petitioner's claims[11] did not address the validity of the acquisition itself (the only

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[10] Other courts of appeals have reached the same result. See, *e.g.*, *Waid*, 91 F.2d at 866 (Title IX claim not precluded by res judicata because the Equal Rights Division had exclusive jurisdiction over appellant's state law claims, precluding the appellant from consolidating her claims into a single lawsuit); *Clark*, 966 F.2d at 1321 (arbitration award did not bar appellant's federal securities claims because of district court's refusal to compel arbitration of such claims). See also *In re Birting Fisheries, Inc.*, 300 B.R. 489 (B.A.P. 9th Cir. 2003) (res judicata does not apply to bar a claim that was not addressed in the prior foreign proceeding).

[11] These include petitioner's claims against GM for fraud, tortious interference with contract, tortious interference with prospective economic advantage, and violations of Florida law; against GMDAT for successor liability; and against all respondents for constructive termination of the Distribution Agreement and violations of Florida law. See App., *infra*, 30a-37a.

issue before the Korean Reorganization Court) at all, but were instead based on respondents' conduct in terminating petitioner's vehicle supply, the related collateral effects of that termination, and respondents' use of the assets acquired from DWMC.[12] See App., *infra*, 30a-37a. Thus, opposing the acquisition in the Korean Reorganization Court would not (and could not) have provided petitioner with "an adequate vehicle to assert fully [its damages claims]" against respondents – only this Court's review can afford the petitioner its "day in court." *Piper Aircraft*, 244 F.3d at 1304.

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The implications of the Eleventh Circuit's decision are far-reaching. If the majority's opinion is allowed to stand, then foreign judgments will be afforded far greater preclusive effect in the Eleventh Circuit than judgments that are rendered by our own courts, in direct conflict with the precedents of other circuits. This Court should resolve these conflicts now and provide the lower courts with much-needed guidance concerning the scope of international comity.

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[12] As part of the asset transfer, respondents are indemnified from "any and all Damages incurred or suffered," backed by $215 million in assets, that arise out of

> (x) the consummation of any of the Transactions or otherwise arising out of the consummation of the Reorganization Plan, but only to the extent such Damages arise out of (i) the assertion of a claim by a wholly-owned Subsidiary of [DWMC] (other than the Acquired Subsidiary) with respect to such consummation.

Because petitioner was "a wholly owned subsidiary" of DWMC, this indemnity covers petitioner's claims against respondents arising from the "consummation of any Transactions" under the MTA or the Modified Plan. Thus, to allow petitioner's damages claims to go forward would not disturb the asset transfer, and indeed, such claims were anticipated (and indemnified against) as part of the transaction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15878-1

D.C. Docket No. 04-00201-CV-ORL-31-KRS

DAEWOO MOTOR AMERICA, INC.,

Plaintiff-Appellant,

v.

GENERAL MOTORS CORP.,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION,

Defendants-Appellees.

GM DAEWOO AUTO & TECHNOLOGY CO.,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida

(August 11, 2006)

Before: TJOFLAT, PRYOR and ALARCÓN,* Circuit Judges

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

PRYOR, Circuit Judge:

The main issue presented in this appeal is whether the district court abused its discretion when it dismissed several claims of Daewoo Motor America, Inc., against General Motors Corporation, Suzuki Motor Corporation, American Suzuki Motor Corporation, and GM Daewoo Auto & Technology Co. (GMDAT) on the ground of international comity. Daewoo America complained that its legal rights, as the exclusive distributor of Daewoo vehicles in the United States, were violated after a Korean bankruptcy court approved a sale of the assets and liabilities of the Korean parent company of Daewoo America and the defendants then sold in the United States automobiles manufactured by GMDAT. Daewoo America was a claimant represented by counsel in the Korean bankruptcy proceedings but, after notice, did not object to the sale of the assets and liabilities of its Korean parent. We affirm.

I. BACKGROUND

Daewoo America was incorporated in 1997 as a wholly owned subsidiary of Daewoo Motor Co., Ltd. (Daewoo Korea), a South Korean automobile manufacturer. Daewoo America served as the exclusive distributor of Daewoo automobiles in the United States and the exclusive provider of warranty services and replacement parts. On November 18, 1999, Daewoo Korea and Daewoo America entered into an Automobile Purchase and Distribution Agreement. Under the Agreement, Daewoo Korea agreed to sell to Daewoo America certain "Products" and granted to Daewoo America "the exclusive right to distribute, sell, rent, lease and otherwise dispose of . . . and service . . . the Products in the United States. . . ." The Agreement also provided that "'Products' shall mean the motor vehicles provided on Exhibit A attached hereto (as said Exhibit A may be amended from time to time by Seller to add or delete motor

vehicle models)." The parties agree that "Exhibit A" never existed and was not attached to the Agreement.

On November 10, 2000, after experiencing financial difficulties, Daewoo Korea filed for bankruptcy protection in Korea under the Korean Corporate Reorganization Act, and the Korean court appointed a receiver. By letter dated November 8, 2000, Daewoo Korea notified Daewoo America of its reorganization plans. The letter included a summary of Korean reorganization law. The letter also warned that creditors must participate in the reorganization and that failure to file a claim would result in a loss of rights.

On November 14, 2002, the Korean bankruptcy court ordered the preservation of the assets of Daewoo Korea. On November 30, 2000, the court ordered the commencement of the reorganization procedure and set the deadline of January 15, 2001, for filing claims. On December 5, 2000, the receiver for Daewoo Korea sent Daewoo America a notice of the filing deadline and guidelines on how to file a claim. In response, Dong Jin Lee, President of Daewoo America, communicated with representatives of Daewoo Korea to obtain assistance with filing a claim in the reorganization proceeding and with employment of an attorney. With the aid of Daewoo Korea, Daewoo America retained the law firm Jin & Lee and executed a Power of Attorney in favor of the firm. Daewoo Korea also appointed agents to act on behalf of Daewoo America in the Korean proceedings. Daewoo America did not object to the appointments.

With the aid of Jin & Lee, Daewoo America filed a proof of claim before the Korean court for approximately $33 million, and on February 3, 2001, filed a supplemental claim for over $45.5 million. On February 26, 2001, the creditors of Daewoo Korea held a meeting at which they reviewed the claims. Jin & Lee attended the meeting on behalf of Daewoo America. The Receiver objected to most of the claims of Daewoo America,

which was notified of the objections by the Korean court. The Korean court also notified Daewoo America that it was required to affirm its claims by filing a claim against the Receiver by the end of March.

Daewoo America then filed a complaint in the Korean court against the Receiver and Daewoo Korea. Daewoo America challenged the objections of the Receiver and sought approval of its claims. The following month, Daewoo America dismissed its complaint. In 2002, Daewoo America filed a second supplemental claim for approximately $1.1 million, which the Receiver approved in its entirety.

Both before and during its reorganization proceedings, Daewoo Korea negotiated with Ford Motor Company and GM about the possibility of a transfer of ownership. In September 2000, Ford withdrew its bid, but negotiations with GM continued. On September 20, 2001, Daewoo Korea and GM executed a non-binding Memorandum of Understanding regarding the sale of assets of Daewoo Korea to GM. The Korean court approved the Memorandum of Understanding on September 26, 2001.

Daewoo America contends that it was to be included in the assets to be purchased by GM, and GM affirmatively represented that Daewoo America would continue to distribute automobiles in the United States under the acquisition plan intended by GM. At an automobile convention in January 2002, GM executives allegedly represented that they looked forward to a working relationship between Daewoo America and GM. Daewoo America alleges that it continued to expand its business based on these representations by GM.

On March 27, 2002, the management team of Daewoo America wrote to GM regarding the possible exclusion of Daewoo America from the asset acquisition. The management team expressed its "extreme concerns about the far reaching negative implications of the possible exclusion of . . . U.S.

operations from the agreements associated with General Motors' pending acquisition of certain assets of Daewoo Korea." The letter also expressed concern about the "potential breach arising from the Automobile Purchase and Distribution Agreement between Daewoo Korea and Daewoo America."

By a letter dated April 17, 2002, Daewoo Korea notified Daewoo America of a meeting to examine the proposed reorganization plan to be held on May 6, 2002. Daewoo America also received a letter of proxy and a summary of the proposed reorganization plan. The summary of the proposed reorganization did not refer to the Memorandum of Understanding or the proposed asset transfer. Despite the concerns expressed in the March 27, 2002, letter, Daewoo America executed the proxy and thereby accepted "the Proposed Reorganization Plan filed by the receiver" and granted to "Han Su Pyon, . . . an officer of [Daewoo Korea], the full power and authority to exercise its voting rights in the meeting of parties in interest as though exercised by the undersigned."

On April 30, 2002, GM, Daewoo Korea, and creditors of Daewoo Korea entered into a Master Transaction Agreement (MTA). The MTA contemplated the creation of a new company, GMDAT, to acquire assets and assume liabilities of Daewoo Korea. Among the assets to be acquired were the vehicle manufacturing plants at which the Daewoo automobiles to be exported for sale in the United States were manufactured. Daewoo America was not included in the assets to be transferred. At the May 6, 2002, meeting of the creditors, the creditors voted in favor of the original reorganization plan. The Korean court approved the plan, but requested that the receiver file a modified reorganization plan that reflected the terms of the MTA entered on April 30, 2002.

At the same time, the Receiver for Daewoo Korea sought permission from the Korean court to terminate the distribution agreement with Daewoo America for non-payment of

approximately $130 million. The Korean court approved the petition of Daewoo Korea on May 6, 2002. The Receiver sent a letter to Daewoo America requesting payment of the outstanding debt, barring which the Distribution Agreement would be terminated.

On April 21, 2002, Daewoo Korea requested permission from the Korean court for Daewoo America to file for bankruptcy in the United States. The Korean court approved the petition, and on May 16, 2002, Daewoo America filed for protection under Chapter 11 in the United States Bankruptcy Court for the Central District of California. In proceedings before the California bankruptcy court, Daewoo America stated that it "fully intend[ed] to pursue all possible causes of action against Daewoo Korea, GM and others, if appropriate." In a letter to counsel for GM dated June 7, 2002, counsel for Daewoo America advised that "[Daewoo America] deems any action by GM to distribute automobiles in the United States manufactured at facilities of Daewoo Motor Co., Ltd. to be a violation and infringement of [Daewoo America's] exclusive right to distribute [Daewoo America] automobile products in the United States."

On September 12, 2002, Daewoo Korea filed a modified reorganization plan that included the terms of the MTA. Daewoo Korea then sent a letter to its creditors to inform them that a meeting on the modified reorganization plan was scheduled for September 30, 2002. Daewoo America received another proxy form to vote on the modified plan. In response to the filing of the modified reorganization plan, Korean counsel for Daewoo America advised that Daewoo America should file its claim in the Korean bankruptcy proceeding promptly. Counsel for Daewoo America in turn notified its creditors' committee, which was authorized by the California bankruptcy court to pursue claims against Daewoo Korea on behalf of Daewoo America, of the need to "promptly take the necessary action to protect the estate's interest."

On September 30, 2002, the creditors of Daewoo Korea adopted and the Korean court approved the modified reorganization plan, which included the MTA. Despite its notice of the meeting and warnings from counsel, Daewoo America did not attend the September 30 meeting and did not execute a proxy to vote for or against the modified reorganization plan. Daewoo America also did not assert any further claims against Daewoo Korea in the Korean court.

On October 17, 2002, GM, Daewoo Korea, and the creditors of Daewoo Korea closed the transactions under the MTA in which assets of Daewoo Korea were transferred to GMDAT. In February 2003, GM and its affiliate American Suzuki announced that they would begin selling automobiles manufactured by GMDAT in the United States under the Chevrolet and Suzuki brands. GMDAT would continue to use the Daewoo brand name in South Korea and all other countries in which GMDAT had acquired subsidiaries. In July 2003, GMDAT announced that its first shipment of vehicles had been made to North America.

On July 22, 2003, Daewoo America filed an action against GM, GMDAT, Suzuki, and American Suzuki in the California bankruptcy court and alleged fraud, tortious interference with contract, tortious interference with prospective economic advantage, aiding and abetting breach of fiduciary duty, violation of the Cartwright Act, unfair competition, unjust enrichment, successor liability, fraudulent transfer, and violation of the automatic stay. Daewoo America sought damages and injunctive relief. The following day, Daewoo America moved the California bankruptcy court to issue a temporary injunction to prevent GM and American Suzuki from importing or selling in the United States any vehicles manufactured by GMDAT. The court denied the motion.

In August 2003, GM and American Suzuki moved to dismiss many of the claims brought by Daewoo America. In

October 2003, the motions were denied in part and granted in part. The California bankruptcy court dismissed several claims against GM and American Suzuki with leave to amend, but dismissed the claims for unjust enrichment and fraudulent transfer without leave to amend.

Daewoo America filed its amended complaint on November 20, 2003. The amended complaint included claims for fraud, tortious interference with contract, tortious interference with prospective economic advantage, aiding and abetting breach of fiduciary duty, violation of the Cartwright Act, unfair competition, successor liability, unauthorized post-petition transfer, violation of the automatic stay, and several claims under Florida and Massachusetts statutes. The defendants moved to dismiss the amended complaint on multiple grounds.

The California bankruptcy court dismissed the claims for violation of the Cartwright Act, unfair competition, and violations of the Massachusetts statutes without leave to amend; dismissed the claims under the Florida statutes with leave to amend; scheduled a hearing on the motions concerning the claims of successor liability, unauthorized post-petition transfer, and violation of the automatic stay; and denied the motions as to the claims of fraud, tortious interference with contract, tortious interference with prospective economic advantage, and aiding and abetting breach of fiduciary duty. In February 2004, the Judicial Panel on Multidistrict Litigation transferred the action to the United States District Court for the Middle District of Florida " 'for inclusion in the coordinated or consolidated pretrial proceedings occurring' for *In re Daewoo Motor Co., Ltd., Dealership Litigation,* MDL Docket No. 1510."

The transferee district court instructed the parties to submit supplemental briefs on the question of international comity and held a hearing on August 20, 2004. On August 26, 2004, the district court dismissed the amended complaint with prejudice

on the ground of international comity. *Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 315 B.R. 148, 161 (2004). The district court also ruled that the Modified Reorganization Plan and MTA approved by the Korean court did not violate the automatic stay of the bankruptcy of Daewoo America because the Distribution Agreement did not give Daewoo America property rights in vehicles manufactured by GMDAT. *Id.* at 160.

The district court explained that granting comity to the Korean bankruptcy proceeding was proper for three reasons. First, the district court found that "Korea has significant interest in regulating business activity on its shores." *Id.* Second, the district court found that "any differences between Korean and U.S. bankruptcy law are minimal and do not offend U.S. notions of due process." *Id.* Third, the district court found that Daewoo America "had notice, as well as a full and fair opportunity to participate in all facets of the Korean bankruptcy process." *Id.* The district court concluded that the "fact that [Daewoo America] now seeks to hold GMDAT liable as the successor of [Daewoo Korea] highlights [Daewoo America's] true intention-to collaterally attack the entire Korean reorganization process and result." *Id.* at 161.

Daewoo America moved the district court for clarification and reconsideration of its order. The district court denied the motion to reconsider, and to the extent clarification was sought, clarified that the order dismissed all of the claims of Daewoo America against the defendants on the ground of comity. The district court entered final judgment for the defendants. Daewoo America appealed.

II. STANDARD OF REVIEW

The parties dispute the applicable standard of review. Daewoo America argues, on the one hand, that we should apply the *de novo* standard of review applicable to the review of an

order granting a motion to dismiss. The defendants argue, on the other hand, that we should review the decision of the district court only for abuse of discretion.

We agree with the defendants. The principle of international comity applied in this case is an abstention doctrine. *Ungaro-Benages v. Dresdner Bank AG,* 379 F.3d 1227, 1238 (11th Cir. 2004). "While we ordinarily review the grant of motions to dismiss or summary judgment *de novo, see Parks v. City of Warner Robins, Georgia,* 43 F.3d 609, 612-13 (11th Cir. 1995), 'a district court's decision to abstain will only be reversed upon a showing of abuse of discretion.' " *Boyes v. Shell Oil Prods. Co.,* 199 F.3d 1260, 1265 (11th Cir. 2000) (quoting *Rindley v. Gallagher,* 929 F.2d 1552, 1554 (11th Cir. 1991)).

We review the factual determinations of the district court for clear error and questions of law *de novo. Coloma v. Holder,* 445 F.3d 1282, 1284 (11th Cir. 2006). "An error of law constitutes an abuse of discretion." *Wexler v. Lepore,* 385 F.3d 1336, 1338 (11th Cir. 2004). The interpretation of a contract is a question of law that the court reviews *de novo. Tobin v. Mich. Mut. Ins. Co.,* 398 F.3d 1267, 1274 (11th Cir. 2005).

III. DISCUSSION

Daewoo America makes four arguments on appeal. First, Daewoo America argues that the district court erroneously concluded that the order of the Korean court that approved the reorganization of Daewoo Korea did not violate the automatic stay of the bankruptcy of Daewoo America. Second, Daewoo America argues that the order of the Korean court was not entitled to comity. Third, Daewoo America argues that, even if comity was appropriate, the order of the Korean court had no effect on the claims that Daewoo America raised against the defendants. Fourth, Daewoo America argues that the California

bankruptcy court erred when it dismissed the claim for unjust enrichment with prejudice. We address each argument in turn.

A. The Approval of the Modified Reorganization Plan of Daewoo America by the Korean Court Did Not Violate the Automatic Stay.

The Bankruptcy Code provides that a petition for bankruptcy "operates as a stay . . . of . . . any act to obtain possession of property of the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). "Property of the estate" is defined as "all legal or equitable interest of the debtor in property as of the commencement of the case." *Id.* § 541(a)(1). The property of the estate of Daewoo America includes any contractual rights that it owned when it filed for bankruptcy.

Daewoo America contends that the Modified Reorganization Plan impaired its property rights in the exclusive distribution agreement with Daewoo Korea. Daewoo America contends that the district court erroneously interpreted the Distribution Agreement to conclude that the rights of Daewoo America under the Distribution Agreement were not impaired by the approval of the Modified Reorganization Plan and that the order of the Korean court did not violate the automatic stay. Daewoo America makes two arguments in support of this contention.

First, Daewoo America argues that the district court erroneously relied on federal, rather than California, law when it interpreted the Distribution Agreement. Daewoo America argues that, under California law, "even if the written agreement of the parties is clear and unambiguous on its face, the trial judge *must* consider relevant extrinsic evidence that can prove a meaning to which the language of the contract is reasonably susceptible." Because the district court interpreted the contract under federal law and only looked at the "plain language" of the

Distribution Agreement to interpret the contract, Daewoo America argues the interpretation of the district court was erroneous. The problem for Daewoo America is that it waived this argument.

Daewoo America failed to raise the choice of law in its arguments and motions before the district court, and Daewoo America failed to raise any question regarding the use of federal law in its motion for reconsideration of the order of the district court. *See William Penn Life Ins. Co. v. Sands*, 912 F.2d 1359, 1362 n. 2 (11th Cir. 1990). On the contrary, in its motion, Daewoo America stated that it "[did] not seek reconsideration of the Court's ruling that the Distribution Agreement does not cover vehicles manufactured by or on behalf of GMDAT." After having failed to raise the choice of law before the district court and, in fact, having disavowed any intention to seek reconsideration, Daewoo America cannot now argue that the law used in the interpretation of the contract by the district court was erroneous. *See id.*

Second, Daewoo America argues that the interpretation of the Distribution Agreement by the district court is not supported by the language of the contract. Daewoo America argues that the district court erroneously concluded that the Distribution Agreement "unambiguously contemplates that [Daewoo America] would distribute only those cars manufactured by [Daewoo Korea] and therefore would not extend to cars manufactured by GMDAT." *Daewoo Motor Am.*, 315 B.R. at 155. This argument fails.

We agree with the district court that the Distribution Agreement did not grant Daewoo America property rights in vehicles that are neither manufactured nor sold by Daewoo Korea. The "terms of the contract suggest only that [Daewoo America] had the exclusive right to sell or distribute the 'Products' of 'Seller' (that is, [Daewoo Korea]) and that [Daewoo America] had the exclusive right to distribute Daewoo

vehicles (not Suzuki or Chevrolet vehicles) in the United States." *Daewoo Motor Am.*, 315 B.R. at 155. The rights of Daewoo America under the Distribution Agreement did not extend to the manufacturing assets of Daewoo Korea transferred by the MTA.

Even under California law, which Daewoo America contends applies, we would affirm the district court. Although, as Daewoo America argues, under California law, whether a "contract is reasonably susceptible to a party's interpretation can be determined from . . . extrinsic evidence," *Cedars-Sinai Med. Ctr. v. Shewry*, 41 Cal. Rptr.3d 48, 60 (Cal. Ct. App. 2006), even considering the extrinsic evidence offered by Daewoo America, the Distribution Agreement is not reasonably susceptible to an interpretation that would give Daewoo America any rights in the vehicles manufactured by GMDAT and sold by Chevrolet and Suzuki. The district court correctly concluded that the order of the Korean court approving the Modified Reorganization Plan of Daewoo Korea did not affect any property interest of Daewoo America and did not violate the automatic stay.

B. The District Court Did Not Abuse Its Discretion by Granting Comity to the Order of the Korean Court.

Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895). To determine whether comity is appropriate, we evaluate three factors: "(1) whether the foreign court was competent and used 'proceedings consistent with civilized jurisprudence,' (2) whether the judgment was rendered by fraud, and (3) whether the foreign judgment was prejudicial because it

violated American public policy notions of what is decent and just." *Ungaro-Benages*, 379 F.3d at 1238. Courts also consider whether "the central issue in dispute is a matter of foreign law and whether there is a prospect of conflicting judgments." *Id.* In matters concerning bankruptcy "the extension of comity 'enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.'" *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 594 (5th Cir. 2003) (quoting *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457-58 (2d Cir. 1985)).

Daewoo America argues that the decision of the district court to grant comity to the Korean order is flawed in four respects. First, Daewoo America argues that it did not have an opportunity to be heard on the claims that are raised in the current litigation and that it was not provided with adequate notice regarding the Modified Reorganization Plan. Second, Daewoo America argues that the application of comity in this case violates the public policy of the United States. Third, Daewoo America argues that the prejudice to its creditors in the United States outweighs any arguments in favor of comity. Fourth, Daewoo America argues that comity should be denied because the Korean court would not grant comity to a decision of the United States. All of these arguments fail.

The district court did not clearly err when it found that Daewoo America had notice of the proceedings in the Korean bankruptcy and an opportunity to participate in those proceedings. The record, which contains multiple notices received by Daewoo America and evidence of the participation of Daewoo America in the bankruptcy process, supports that finding. The argument of Daewoo America that its claims against the defendants were not heard does not refute that Daewoo America had notice of and participated in the Korean bankruptcy proceedings. Moreover, the record supports the conclusion of the district court that the notice received by

Daewoo America was adequate. The record evidences that Daewoo America received notice of all the main events of the bankruptcy proceedings, including the final meeting of the creditors on September 30, 2002, to vote on the Modified Reorganization Plan. Daewoo America chose not to attend the meeting, and Daewoo America did not either vote by proxy on or otherwise object to the Modified Reorganization Plan.

Daewoo America has not identified any "public policy notion[] of what is decent and just" that is offended by the application of comity to the Korean bankruptcy order. *Ungaro-Benages*, 379 F.3d at 1238. The district court did not abuse its discretion when it determined that the interests of Korea in regulating business activity on its shores and the interests of the courts in dispersing a debtor's assets equitably and systematically outweighed the prejudice to Daewoo America, *see Int'l Transactions, Ltd.*, 347 F.3d at 594, and reciprocity is not an absolute precondition to comity, *see Remington Rand Corp.-Del. v. Bus. Sys. Inc.*, 830 F.2d 1260, 1273 (3d Cir. 1987). The argument of Daewoo America also ignores that "the interest of the system as a whole – that of promoting 'a friendly intercourse between the sovereignties,' – also furthers American self-interest, especially where the workings of international trade and commerce are concerned." *In re Maxwell Comm'n Corp.*, 93 F.3d 1036, 1053 (2d Cir. 1996) (internal citation omitted). Under The Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, 8 U.S.T. 2217, in fact, a Korean judgment is elevated to the status of a sister state judgment. *See Vagenas v. Continental Gin Co.*, 988 F.2d 104, 106 (11th Cir. 1993). The district court did not abuse its discretion when it granted comity to the order of the Korean court.

C. The District Court Did Not Abuse Its Discretion When It Found That the Claims of Daewoo America Were Intertwined with the Order of the Korean Court.

Daewoo America next argues that the scope of the comity granted to the order of the Korean court should not extend to its claims against the defendants because those claims were not and could not have been raised in the Korean bankruptcy proceeding. Daewoo America argues that because its claims did not exist at the time of the Korean bankruptcy filing, they did not "arise out of the same nucleus of operative fact, [and were not] based upon the same factual predicate, as the Plan Approval Order," and were not necessarily put at issue by the Korean proceedings. These arguments fail.

The claims of Daewoo America arise out of the same nucleus of operative facts considered by the Korean court. The claims of Daewoo America are based on the Modified Reorganization Plan and MTA, which were approved by the Korean court. The validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court. The complaint of Daewoo America regarding the effect of the MTA should have been raised before the Korean court. Daewoo America cannot now collaterally attack that order by bringing claims against the recipients of the property transferred based on the approval by the Korean court.

The collateral nature of the claims of Daewoo Korea is made more apparent by its request for relief. On eleven of fourteen claims, the relief sought is an injunction against the defendants. On another claim, the relief sought is that the "transfer be set aside." Because granting the relief sought would require the court to set aside the asset transfer to the defendants, which was approved by the Korean court, the complaint is a collateral attack on the order of the Korean court. *See Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972)

("Even though an action has an independent purpose and contemplates some other relief, it is a collateral attack if it must in some fashion overrule a previous judgment.").

The reliance of Daewoo America on *In re Piper Aircraft Corp.*, 244 F.3d 1289 (11th Cir. 2001), and *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900 (7th Cir. 1990), is misplaced. In *In re Piper Aircraft*, this Court concluded that the complaint of Kaiser Aerospace and Electronics Corp. against Teledyne Industries, Inc., for breach of contract, breach of fiduciary duty, and constructive trust, was not barred by res judicata because "the facts underpinning the . . . action (i.e., Teledyne's alleged breach of [contract] and its fiduciary duties to Kaiser) were not at issue in the confirmation proceeding." 244 F.3d at 1297. In contrast, the facts underpinning the complaint of Daewoo America against the defendants were at issue in the Korean proceeding because those facts relate to the approval of the Modified Reorganization Plan and the MTA. The claims of Daewoo America rely entirely on the alleged invalidity of the transactions approved by the Korean court.

Second, *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.* is inapposite. In *La Preferida*, the Seventh Circuit concluded that the suit of La Preferida against Cerveceria Modelo for tortious inference with a contract between La Preferida and Corona was not barred by the entry of a consent judgment in the bankruptcy proceedings of Corona. *La Preferida*, 914 F.2d at 907. The court concluded that the consent judgment was ambiguous and applied the general rule forbidding the application of collateral estoppel to consent judgments. *Id.* In contrast with *La Preferida*, the district court did not apply comity to bar the claims of Daewoo America because of a consent judgment. The district court dismissed the claims of Daewoo America because the relief sought by Daewoo America undermined the orders of the Korean court regarding the reorganization of Daewoo Korea.

This case is more akin to *Miller v. Meinhard-Commercial Corp.*, in which Miller, a creditor in a bankruptcy proceeding, sued Meinhard-Commercial, another creditor, for fraud nine months after the bankruptcy plan had been confirmed. Miller alleged that he had been fraudulently induced to acquiesce in the bankruptcy plan. 462 F.2d. at 359. The court rejected Miller's suit as a collateral attack upon the bankruptcy proceedings:

> Through his fraud action, Miller is indirectly asserting that the Chapter XI proceeding should never have been approved and that a Chapter X procedure should have been decreed instead. The suit obviously turns upon what could or should have happened in the bankruptcy proceeding. It is specious to argue that Miller's action in fraud is unrelated or only coincidentally related to the merits of the bankruptcy proceeding.
>
> . . . .
>
> . . . The very gist of this suit is the allegation that the arrangement was somehow improper. To sanction it would be in effect to reopen the bankruptcy proceedings and retry the merits in a collateral proceeding.

Id. at 360-61.

The complaint of Daewoo America, likewise, turns on what happened in the Korean bankruptcy proceeding and is inextricably intertwined with the order of the Korean court. In effect, Daewoo America seeks to redistribute the assets that were transferred with the approval of the Korean court. The district court did not abuse its discretion when it dismissed the claims of Daewoo America on the ground of comity.

D. The California Bankruptcy Court Did Not Err When It Dismissed with Prejudice the Claim of Daewoo America for Unjust Enrichment.

The final argument of Daewoo America is that the California bankruptcy court erred when it dismissed the claim of Daewoo America for unjust enrichment without leave to amend. Under California law, a quasi-contract claim for unjust enrichment cannot lie when there is a written contract that covers the same subject matter. *Cal. Med. Ass'n v. Aetna U.S. Healthcare, Inc.*, 114 Cal. Rptr. 2d 109, 125 (Cal. Ct. App. 2001). Because all the claims of Daewoo America, including the unjust enrichment claim, rely on the existence of a written contract, amendment would be futile and the California bankruptcy court did not err when it dismissed the unjust enrichment claim without leave to amend.

IV. CONCLUSION

The dismissal of the complaint of Daewoo America is

AFFIRMED.

TJOFLAT, Circuit Judge, specially concurring:

I concur in the judgment of the court, but I write separately because I do not believe that international comity entirely disposes of Daewoo America's Amended Complaint. Contrary to the court's decision, Daewoo America's entire lawsuit does not "turn[] on what happened in the Korean bankruptcy proceeding," *ante* at [18a], nor is it "inextricably intertwined with the order of the Korean court," *id.* For the vast majority of Daewoo America's claims, the proceedings before the Korean bankruptcy court serve as little more than a factual backdrop. When properly understood, most of Daewoo America's claims solely concern the defendants' dealings with Daewoo America, separate and distinct from the transfer of Daewoo Korea's manufacturing assets to GM and its partners. Stated differently,

this dispute simply is not part of the Korean bankruptcy, and granting international comity to the Korean bankruptcy court's orders does little to resolve it. The district court therefore could not have dismissed Daewoo America's entire Amended Complaint on the ground of international comity. In my view, analyzing the claims presented in the Amended Complaint, a task on which the court expends little effort, is the proper way to decide this appeal. Doing so reveals that the premises on which those claims rest are flawed, and that each claim in the Amended Complaint should be dismissed.[1]

Part I of the following discussion outlines the course of dealing between Daewoo America and GM. In its discussion of the facts underlying this dispute, the court chooses to focus mostly on the proceedings in the Korean bankruptcy court. While I have no quarrel with the accuracy of this account, I believe that providing more detail on the defendants' (and particularly GM's) alleged conduct vis-à-vis Daewoo America is required fully to understand this case. Part II discusses Daewoo America's claims in detail, and illustrates that most of them do not put the validity of the Korean bankruptcy proceeding in issue. Part III groups and analyzes those remaining claims, revealing them to be groundless. Part IV briefly concludes.

I.

Daewoo America was the seller, distributor and warranty provider of Daewoo automobiles in North America. On

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[1] I therefore would affirm the district court's disposition of this case which is why I concur in the judgment of the court. *See Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992) ("[T]his court may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court.").

November 18, 1999, Daewoo America and Daewoo Korea, its parent company, entered into the Distribution Agreement. The Distribution Agreement states, in relevant part:

> Whereas, Seller [Daewoo Korea] is the exclusive worldwide distributor of the Products (as defined in Section 1), which are manufactured by Seller;
>
> Whereas, Seller, as exclusive worldwide distributor has the right to grant to others the exclusive right to sell the products [sic] in certain regions, including the Territory (as defined in Section 2);
>
> . . .
>
> . . . Seller hereby agrees to sell to Buyer [Daewoo America] and Buyer hereby agrees to purchase from Seller the Products for resale or for rental or lease in the Territory. For purposes of this Agreement, "Products" shall mean the motor vehicles provided on Exhibit A attached hereto (as said Exhibit A may be amended from time to time by Seller to add or delete motor vehicle models) and the parts, accessories and equipment therefor, together with any warranty provided by the Seller at no cost to Buyer.[2]
>
> . . .
>
> Seller hereby grants to Buyer the exclusive right to distribute, sell, rent, lease and otherwise dispose of (collectively "Sell") and service, directly or through one or more subsidiaries or independent contractors, the Products in the United States and all territories and possessions thereof (collectively, "Territory"). Seller shall not Sell or service, directly or indirectly, or permit any other person or

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[2] Although the Distribution Agreement states that the "Products" covered by the agreement are enumerated in an attached "Exhibit A," the district court found, and the litigants agreed, that no such exhibit ever existed.

> corporation, partnership, limited liability company or their entity to Sell or service the Products in the Territory.

Doc. 144, Ex 7. The term of the agreement was ten years (unless terminated under certain conditions), and would automatically renew every five years unless either party specified otherwise. Daewoo Korea manufactured the vehicles and parts it delivered to Daewoo America at its plants in South Korea and Vietnam (the "Daewoo Korea Plants").[3]

Daewoo Korea filed for bankruptcy in South Korea in November 2000. The record makes clear that Daewoo America was fully aware of Daewoo Korea's financial distress, and knew that Daewoo Korea was negotiating the sale of a substantial portion of its assets to GM. Moreover, Daewoo America was on notice that those assets included the Daewoo Korea Plants. In a November 9, 2000 letter to its employees, Daewoo America stated that "under creditor and court imposed receivership, Daewoo Motor Korea is solidly positioned to proceed with concluding the transition of the company to a new owner on an accelerated basis, such as the possibility of General Motors." Doc. 123, Ex. 7. Around this time, Daewoo America claims that GM, without its knowledge, entered into negotiations with Suzuki for the purpose of forming an acquisition partnership for Daewoo Korea's assets. Am. Compl. ¶ 28.

Daewoo America alleges that GM promised to continue using it as the distributor of Daewoo vehicles and parts in the United States after it completed its acquisition of Daewoo

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[3] According to the Amended Complaint, the plants ultimately sold to GM and transferred to GMDAT "included those located in Changwoon and Kunsan, South Korea, and another located in Hanoi, Vietnam," and that GM also had "an obligation to acquire, pending the satisfaction of certain conditions, or the waiver of those conditions by [GMDAT], the Daewoo Korea plant in Bupyong, South Korea." Am. Compl. ¶ 51.

Korea's assets. Am. Compl. ¶ 34. Daewoo America further claims that, in reliance on this alleged promise, it initially continued to expand its dealership network by entering into new dealership agreements. *Id.* at ¶ 35.

On September 20, 2001, Daewoo Korea (and its bankruptcy receiver) entered into a non-binding Memorandum of Understanding (the "MOU") with GM. The MOU provided that certain Daewoo Korea domestic and foreign assets, including several manufacturing facilities, would be transferred to and controlled by a newly-formed company owned by GM and a consortium of investors (later named "GMDAT"). According to Daewoo America, it was listed among the sale assets described in the MOU. On September 26, 2001, the Korean bankruptcy court approved the MOU. At subsequent due diligence meetings between Daewoo America and GM, Daewoo America claims that GM specifically asked it temporarily to halt the appointment of new Daewoo dealers, because GM would be in a position to assist it in identifying new dealers once the acquisition closed. Am. Compl. ¶ 38.

Daewoo America claims that, at a November 9, 2001 meeting in Seoul, South Korea, GM again indicated that it would continue to be the primary distributor of Daewoo vehicles in North America. In reliance on these and other statements made by GM, Daewoo America claims that it refrained from adding new dealers to its network and continued to accumulate inventory at its ports. Am. Compl. ¶ 40. Daewoo America also purportedly secured GM's verbal promise that it would not "rebadge" the Daewoos it manufactured at the Daewoo Korea Plants. *Id.* The effect of such rebadging, presumably, would be to cut Daewoo America out of the distribution chain, because the Distribution Agreement authorized Daewoo America to sell and distribute vehicles under the Daewoo brand, and no others.

Daewoo America also asserts that during an automotive convention in or around January 2002, it had a display booth

next to that of GM and GM's financing arm, which "strongly implied the forthcoming anticipated alliance of [Daewoo America] with GM." Am. Compl. ¶ 42. Moreover, GM executives represented to Daewoo America during that convention that they looked forward to a working relationship between the two companies. *Id.*

Despite all of these promises from GM, Daewoo America still felt it necessary to express its "extreme concerns about the far reaching negative implications of the possible exclusion of [Daewoo America]'s U.S. operations from the agreements associated with General Motors' pending acquisition of certain assets of Daewoo Korea" in a letter dated March 27, 2002 to GM's senior executives. In Daewoo America's view, these concerns "include[ed] the potential breach arising from the [Distribution Agreement] between Daewoo Korea and [Daewoo America]." Doc. 124 Ex. 21 at DMA000071.

On April 30, 2002, Daewoo Korea and GM executed the Master Transaction Agreement ("MTA"). The agreement created GMDAT, which received certain of Daewoo Korea's assets, including the Daewoo Korea Plants. On September 12, 2002, Daewoo Korea filed a modified reorganization plan (the "Modified Plan"), which incorporated the terms of the MTA. Daewoo America was not among the assets sold in the transaction. The MTA also permitted the sale of Daewoo-brand vehicles throughout the world, and allowed vehicles manufactured at the Daewoo Korea Plants to be sold in North America under non-Daewoo brand names. In 2003, after the asset sale closed, GM and Suzuki announced that they would begin exporting vehicles manufactured at the Daewoo Korea Plants to the United States for sale under the Chevrolet and Suzuki brands.

Daewoo America's financial difficulty – much of which it blames on the defendants' purported misrepresentations and conduct – led it to seek Chapter 11 bankruptcy relief in the

United States Bankruptcy Court for the Central District of California on May 16, 2002. As part of the bankruptcy filing, an automatic stay under 11 U.S.C. § 362(a) was put in place, which froze Daewoo America's assets, brought them under the control of the bankruptcy court, and barred any other persons or entities from attempting to obtain possession of or exercise control over them.[4] Daewoo America thereafter instructed its United States and Korean counsel to explore potential causes of action arising out of Daewoo Korea's asset sale. It also communicated to the California bankruptcy court its full intention "to pursue litigation" against Daewoo Korea, GM, "and other parties relating to the sale of assets of Daewoo Korea to a consortium consisting of GM and certain creditors of Daewoo Korea." Doc. 125, Ex. 28. Daewoo America never notified the Korean bankruptcy court, or any other Korean Court, of its concerns with respect to GM's conduct.[5]

On July 22, 2003, Daewoo America commenced an adversary proceeding in the California bankruptcy court by filing a multi-count complaint (the "Original Complaint") against GM, GMDAT, Suzuki and American Suzuki. Reduced

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[4] "Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the [bankruptcy] estate or of property from the estate or to exercise control over property of the estate. . . ." 11 U.S.C. § 362(a)(3).

[5] The "proof of claim" to which the court refers, *ante* at [3a], was against Daewoo Korea for various charges related to their parent/subsidiary relationship. These charges had nothing to do with the defendants or the claims in this lawsuit. Likewise, the complaint filed by Daewoo America against Daewoo Korea and its receiver, which it subsequently dismissed, did not involve the defendants' conduct. *Ante* at [4a].

to its essentials, the Original Complaint alleged that (1) Daewoo America reasonably relied on GM's misrepresentations, and (2) this gave GM and its partners the opportunity to supplant Daewoo America as the exclusive distributor of Daewoo automobiles in the United States. This outcome, according to Daewoo America, was fraudulent, and resulted in, among other things, injury to competition and unjust enrichment of the defendants.[6] To salve its injuries, Daewoo America requested both damages and injunctive relief. In further pursuit of its prayer for injunctive relief, Daewoo America moved the court to issue a temporary restraining order preventing the defendants from importing the Chevrolets and Suzukis manufactured at the Daewoo Korea Plants. The California bankruptcy court denied the motion. GM and Suzuki thereafter moved the court to dismiss most of Daewoo America's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). The California bankruptcy court denied the motions in part and granted them in part with leave to amend.

On November 20, 2003, Daewoo America filed an Amended Complaint,[7] which added several claims but was

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[6] Daewoo America's Original Complaint contained eleven counts or "claims." It is unnecessary to detail the allegations of these claims because, with the exception of its claim sounding in "unjust enrichment," which the California bankruptcy court dismissed for failure to state a claim for relief, they were replicated by the claims asserted in the Amended Complaint.

[7] The Amended Complaint, a typical "shotgun pleading" containing multiple counts, each incorporating by reference all the (usually irrelevant) allegations of previous counts, *see Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 n.9 (11th Cir. 2002), includes the following fourteen claims: (1) Fraud against GM; (2) Tortious Interference with Contract against GM; (3) Tortious Interference with Prospective Economic Advantage against GM; (4) Aiding and Abetting Breach of Fiduciary Duty

otherwise based on the same conduct alleged in the Original Complaint.[8] GM, GMDAT, and American Suzuki moved the bankruptcy court for dismissal pursuant to Rule 12(b)(6). The court denied GM's motion as to the First, Second, Third and Fourth Claims. The court granted the motions without leave to

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against GM; (5) Violation of the Cartwright Act against all defendants; (6) Unfair Competition against all defendants; (7) Successor Liability against GMDAT; (8) Unauthorized Post-Petition Transfer (11 U.S.C. § 549) against all defendants (9) Violation of the Automatic Stay (11 U.S.C. § 362) against all defendants; (10) Violation of the Automatic Stay (11 U.S.C. § 362) against GM; (11) Constructive Termination of the Distribution/Franchise Agreement (Fla. Stat. § 320.641) against all defendants; (12) Illegal Conduct Related to Motor Vehicle Business (Fla. Stat. § 320.64(4)) against GM; (13) Termination of the Distribution Agreement (Mass. Stat. 93B § 4(c)(12)) against GM, and; (14) Constructive Termination of the Distribution Agreement (Mass. Stat. 93B § 5) against all defendants. These claims are described in full in the text, *infra*.

[8] The court states that "[o]n eleven of fourteen claims, the relief sought [by Daewoo America] is an injunction against the defendants," and "[o]n another claim, the relief sought is that the transfer must be set aside." *Ante* at [16a] (internal quotation omitted). While in a sense true, this observation is somewhat misleading. Daewoo America did ask for injunctive relief on eleven of its claims, but it also asked for *damages* on *thirteen* of them. In fact, it asked exclusively for damages in two claims, whereas it asked exclusively for an injunction in only one. Curiously, the court neglects to mention any of this. I can only conclude that its omission was calculated to bolster its argument that giving Daewoo America the relief it has requested would require us to unwind the asset sale to GM, and would also require us to invalidate the Korean court's orders and proceedings. Awarding Daewoo America damages pursuant to its claims, however, would do nothing to disturb GM's ownership interest in GMDAT, nor would it affect GMDAT's continued control of the Daewoo Korea Plants and other assets.

amend as to the Fifth, Sixth, Thirteenth and Fourteenth Claims. The court also granted the motions with respect to the Eleventh and Twelfth Claims, but with leave to amend. To determine Daewoo America's rights under the Distribution Agreement, and to consider whether the Korean bankruptcy court's approval of the asset sale should be accorded international comity, the court deferred ruling on the motions to dismiss Daewoo America's Seventh, Eighth, Ninth and Tenth Claims. In so doing, the court recognized the possibility that a judgment for Daewoo America on these claims could constitute a collateral attack on the Korean bankruptcy court's orders.

Before the bankruptcy court could hear argument on the international comity issue, the Judicial Panel on Multidistrict Litigation (the "JPML") transferred the proceeding to the United States District Court for the Middle District of Florida, where several Daewoo automobile dealerships had filed suit against GM, GMDAT and American Suzuki.[9] That court, like the California bankruptcy court before it, instructed the parties to submit supplemental briefs on whether international comity should bar Daewoo America's claims. After an August 20, 2004 hearing, the court entered an order dismissing the Amended Complaint with prejudice.[10]

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[9] In claims similar to those filed by Daewoo America, several Daewoo dealerships accused GM, GMDAT and American Suzuki of being responsible for terminating the supply of Daewoo vehicles and parts that Daewoo Korea exported to the United States. The district court dismissed the dealerships' complaint with prejudice on January 6, 2005. *In re Daewoo Motor Co. Ltd. (Dealership Litigation)*, No. JPML-1510, January 6, 2005.

[10] In its order, the court made no mention of the California bankruptcy court's dispositive rulings on the merits of Daewoo America's claims. I can only assume that the court ruled as though it had the entire Amended Complaint before it, and thus dismissed the Amended Complaint in its entirety.

The district court made two broad rulings. First, it concluded that the asset sale to GM did not violate the automatic stay put in place by Daewoo America's bankruptcy, because the Distribution Agreement gave Daewoo America no property rights in Daewoo Korea's assets. In other words, Daewoo America did not own any of the property Daewoo Korea sold to GM and its partners. Additionally, the Distribution Agreement did not support Daewoo America's contention that it had a perpetual right to sell and distribute cars manufactured in the Daewoo Korea Plants, regardless of who owned those plants and regardless of the branding of those cars. Its rights pertained specifically and exclusively to cars sold by Daewoo Korea under the Daewoo brand. Second, the court found that the remainder of Daewoo America's claims functioned as a collateral attack on the Korean bankruptcy court's orders approving the sale of Daewoo Korea's assets to GM. To avoid review of the Korean proceedings, and to accord them due respect, the court declined to exercise its jurisdiction on the grounds of international comity. The court concluded that doing so was appropriate because: (1) there is little difference between United States and Korean bankruptcy law; (2) Korea had a significant interest in the reorganization of Daewoo Korea, and; (3) Daewoo America was notified of and fully participated in the reorganization proceedings but chose not to oppose them.[11] Daewoo America

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[11] Pursuant to Federal Rule of Civil Procedure 12(b), a district court generally must convert a motion to dismiss into a Rule 56 motion for summary judgment if the court considers materials outside of or not attached to the complaint. *Day v. Taylor*, 400 F.3d 1272, 1275-76 (11th Cir. 2005). Under most circumstances, such material would not be part of the record underpinning a Rule 12(b)(6) ruling. *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999) (*citing* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 299 (2d ed.1990)). Here, the district court's dispositive order made reference to several documents, such as the Distribution Agreement and the MTA, that were not attached to the

moved the court to clarify and reconsider its decision. The court denied the motion and entered final judgment for GM and the other defendants. This appeal followed.

II.

As previously indicated, the Amended Complaint contains fourteen claims. Each is directed at the conduct of GM and the other defendants. In my view, only claims Four, Eight, Nine, and Ten, which I discuss in subsection II.B., necessarily implicate the validity of the Korean bankruptcy court's proceedings and orders. The remaining ten claims, by contrast, concern the defendants' conduct separate and apart from those proceedings and orders.

A.

The First Claim sounds in fraud.[12] The claim is that GM falsely represented that it would continue Daewoo Korea's distribution relationship with Daewoo America; that Daewoo America would have the exclusive right to sell and distribute the

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Amended Complaint. Nevertheless, "[o]ur prior decisions also make clear that a document need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, we may consider such a document" if that document is central to the plaintiff's claims. *Day*, 400 F.3d at 1276 (*citing Ivax Corp.*, 182 F.3d at 802 n.2). Clearly, the Distribution Agreement and the MTA are integral to the allegations contained in Daewoo America's Amended Complaint. Additionally, no party has contested the contents or authenticity of those documents. It was therefore unnecessary for the district court to convert the defendants' motions to dismiss into motions for summary judgment.

[12] For claims One through Four, and for Claim Seven, Daewoo America does not identify which state's law applies.

vehicles made at the Daewoo Korea Plants now operated by GMDAT; that Daewoo America reasonably relied on GM's misrepresentation to its detriment by foregoing its right to file a claim against Daewoo Korea during the Korean bankruptcy proceedings, or to otherwise oppose that court's approval of the asset sale; and that Daewoo America continued to purchase Daewoo Korea parts and to add dealerships to its network of dealers, based on its expectation that GM would keep its word.

The Second Claim, Tortious Interference with Contract against GM, is that Daewoo America's contracts have been interrupted "as a result of GM's acquisition" of the Daewoo Korea Plants. Daewoo America accuses GM of intentionally interfering with Daewoo Korea's performance of the Distribution Agreement (i.e., Daewoo Korea's delivery of cars) and, by extension, interfering with Daewoo America's ability to provide its dealerships with cars. The tort alleged here is not the GM acquisition itself; the validity of the acquisition is not questioned. Rather, at issue is the termination of Daewoo America's car supply, and GM's role and intention in bringing about that termination. Put another way, it is the goal of the acquisition that is at issue, with Daewoo America insisting that GM purchased the Daewoo Korea assets specifically to cause it economic harm. The acquisition is merely the vehicle by which GM fulfilled its tortious purpose.

The Third Claim is that GM tortiously interfered with Daewoo America's "Prospective Economic Advantage," which is described as the expected expansion of Daewoo America's distribution and servicing network. Again, Daewoo America focuses on GM's statements-in particular, GM's request that Daewoo America cease entering into new dealership agreements. Daewoo America in effect claims that GM promised to assume Daewoo Korea's performance of the Distribution Agreement and that it relied on the promise and complied with GM's request. In Daewoo America's view, GM's promise caused it to forego the expansion of its dealership

network and, resultantly, to forego the profit it would have realized through that network expansion.

Daewoo America's Fifth Claim is that the all of the defendants violated California's Cartwright Act,[13] an antitrust statute; they "conspired, combined, and entered [into] agreements to limit or reduce production, or increase the price, or prevent" Daewoo America from competing in the distribution and sale of Daewoos. Although Daewoo America acknowledges that the "Master Transaction Agreement operates to eliminate competition," and that the agreement supplants its distribution rights, it focuses more on what the defendants did after they began to import Daewoos for sale in the United States. The defendants have cut off its supply of cars, and have been distributing the cars Daewoo America believes it should be distributing. Daewoo America attacks not the MTA, but the defendants' use of the assets the MTA provided. In other words, Daewoo America believes that the defendants have used these assets for an illegal, anticompetitive purpose, whether those assets were acquired validly or not.

The Sixth Claim, Unfair Competition under California law, is a "catch-all" cause of action, which incorporates the First through the Fifth claims and all of the defendants' conduct described in the Amended Complaint.[14] Daewoo America

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[13] Cal. Bus. & Prof.Code § 16720 *et seq.*

[14] Daewoo America cites Cal. Bus. & Prof.Code § 17200 *et seq.* as the basis for its unfair competition claim. Unfair competition under this section includes "any unlawful, unfair or fraudulent business act or practice." *Gregory v. Albertson's, Inc.*, 128 Cal. Rptr. 2d 389, 392 (Cal. Ct. App 2002) (internal quotation marks omitted). A business act is "unlawful" if it is forbidden by law. *Walker v. Countrywide Home Loans, Inc.*, 121 Cal. Rptr. 2d 79, 86 (Cal. Ct. App. 2002). An act is "unfair" if it is "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the

alleges that the defendants have caused its business to be "substantially impaired or destroyed" and that it has "no adequate remedy at law" for its injuries. As indicated above, Daewoo America finds fault in much of the defendants' conduct, most of which was not material to the issues litigated in the Korean bankruptcy.

Daewoo America's Seventh Claim, Successor Liability against GMDAT, is that Daewoo Korea executed the sale of its assets "for the fraudulent purpose of escaping [its] debts and liabilities to [Daewoo America]." Among those unpaid debts and liabilities was Daewoo Korea's obligation under the Distribution Agreement to supply Daewoo America with cars for sale and distribution in the United States. Because GMDAT ran Daewoo Korea's automotive manufacturing business both before and after the acquisition, received Daewoo Korea's assets, and continued to employ many of Daewoo Korea's workers, GMDAT is Daewoo Korea's successor-in-interest. As such, "GMDAT is liable . . . to the same extent as Daewoo Korea." Though obvious, it is worth emphasizing that this claim is directed at GMDAT, not Daewoo Korea. Far from attacking the validity of the Korean bankruptcy court's proceedings and the resultant asset sale, this Seventh Claim is simply seeking to enforce the bankruptcy court's order.[15]

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law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999). "In effect, the UCL [California's Unfair Competition Law] borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL." *Lazar v. Hertz Corp.*, 82 Cal. Rptr. 2d 368, 375 (Cal. Ct. App. 1999).

[15] While Daewoo America does claim that Daewoo Korea acted fraudulently during the asset sale process, this is basically immaterial to its claim. Daewoo America is not trying to upset the bankruptcy order. Rather, it believes GMDAT has an obligation to Daewoo America that survives bankruptcy and is attempting to enforce it.

The Eleventh Claim, Constructive Termination of the Distribution Agreement under Florida law,[16] is that GM's acquisition of the Daewoo Korea Plants and the defendants' sale in the United States of the vehicles manufactured at those plants operated to terminate the Distribution Agreement and Daewoo America's agreements with its Florida automotive dealers. Like the Second and Fifth Claims, this claim rests on what happened after GM and its partners purchased the Daewoo Korea Plants, and not on the invalidity of the acquisition itself. Again, Daewoo America focuses on the "rebadging" of Daewoos manufactured in the Daewoo Korea Plants, which the defendants market and sell in the United States, and the termination of its supply of cars for sale and distribution in the same geographic market. The validity of the asset sale has no bearing on the legal sufficiency of this claim.

The Twelfth and Thirteenth claims are statutory, Illegal Conduct Related to a Motor Vehicle Business under Florida law,[17] and Constructive Termination of the Distribution

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[16] Daewoo America failed to specify the statutory subsection that formed the basis for this claim. It nevertheless appears that Daewoo America based this claim on Fla. Stat. § 320.641(1)(b)(3), which proscribes the "unfair" termination of a franchise agreement. Such termination is unfair if "it is not clearly permitted by the franchise agreement; is not undertaken in good faith; is not undertaken for good cause; or is based on an alleged breach of the franchise agreement which is not in fact a material and substantial breach; or if the grounds [for termination] have not been applied in a uniform and consistent manner by the licensee."

[17] Fla. Stat. § 320.64(4) permits the revocation of a motor vehicle dealer's license to operate in the state if that dealer "has indulged in any illegal act relating to his or her business" with such frequency as to establish a pattern of wrongdoing. This subsection also allows any motor vehicle dealer harmed by another's violation of the subsection to seek legal and equitable remedies against the offender. *See* Fla. Stat. §§ 320.695, 320.697.

Agreement Against GM under Massachusetts law.[18] GM's overall conduct caused Daewoo America to suffer a pecuniary loss or other adverse affect in carrying out its business. As is the case with the Sixth Claim, Daewoo America supports these claims by referring to conduct completely separate from that involved in the Korean bankruptcy court's proceedings.

The Fourteenth Claim, Constructive Termination of the Distribution Agreement,[19] is directed against all of the defendants and is substantially similar to the Second Claim. It alleges that the defendants, by refusing to supply Daewoo America with the cars manufactured in the Daewoo Korea Plants, and by selling and distributing those cars in the United States themselves, have effectively terminated both the Distribution Agreement and Daewoo America's agreements with its dealers. Like the Second Claim, Daewoo America puts the defendants' intent in issue; they purchased the Daewoo Korea Plants for the purpose of terminating Daewoo America's agreements with malice or in bad faith.

Daewoo America's factual allegations can be separated into two categories. The first consists of the defendants' "promise" that Daewoo America would have a role in the post-transfer, post-Daewoo Korea period; it would distribute the

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[18] Daewoo America cites Mass. Gen. Laws ch. 93B, § 4(c)(12) as the basis for its Thirteenth Claim. This provision makes it illegal for vehicle manufacturers, distributors and franchisors "to act to accomplish, either directly or indirectly through any parent company, subsidiary, or agent, what would otherwise be prohibited under this chapter on the part of the manufacturer or distributor."

[19] Daewoo America cites Mass. Gen. Laws ch. 93B, § 5 as the basis for this claim. It is illegal under this statute for a manufacturer, distributor or franchisor to, among other things, terminate or refuse to renew a motor vehicle dealer franchise agreement "without good cause, in bad faith, or in an arbitrary or unconscionable manner." *Id.* § 5(a).

cars manufactured at the Daewoo Korea Plants. Daewoo America relied on this promise. The promise went for naught, however, when GM and Suzuki agreed that the cars produced at those plants would be rebadged and distributed by Suzuki. The second category assumes that the defendants eliminated Daewoo America's vehicle supply for anticompetitive purposes, led Daewoo Korea to shirk its delivery responsibilities under the Distribution Agreement, and refused to take on those delivery responsibilities in Daewoo Korea's stead. Claims Six, Thirteen, and Fourteen assert conduct falling under both categories.

The district court's order provides no explanation as to how the validity of the MTA, the Korean bankruptcy court's orders, or the Korean bankruptcy proceedings might have any impact on these claims. Indeed, such validity is irrelevant to the question of whether GM's promise to make Daewoo America its United States distributor was intentionally untruthful. Likewise, such invalidity is irrelevant to the question of whether the defendants eliminated Daewoo America's vehicle supply with tortious or anticompetitive intent. Moreover, as I have explained, Daewoo America's Seventh Claim, the Successor Liability claim against GMDAT, is entirely dependent on the validity of the Korean bankruptcy proceedings; Daewoo America cannot recover against GMDAT as Daewoo Korea's successor if the transaction by which GMDAT gained that position is voided. In sum, I cannot agree with the court that addressing these claims would necessitate the review, and perhaps invalidation, of one or more of the decisions of the Korean bankruptcy court. According to that court's decisions, international comity simply ignores claims that are entirely foreign to that court's proceedings and jurisdiction. These claims should be dismissed on the ground that they are legally insufficient, not because international comity forecloses their consideration.

B.

Unlike the claims discussed above, the Fourth, Eighth, Ninth and Tenth Claims, by their nature, call the Korean bankruptcy court's orders and proceedings into question. The Fourth Claim, Aiding and Abetting Breach of Fiduciary Duty, is that Daewoo Korea, as Daewoo America's controlling shareholder, had a fiduciary duty to preserve and maximize Daewoo America's assets and to prevent the subsidiary's insolvency – for the benefit of both Daewoo America and its creditors. These assets, according to Daewoo America, included its right under the Distribution Agreement to receive cars from the Daewoo Korea Plants and to sell and distribute them in the United States. GM was aware of Daewoo Korea's fiduciary duty, but through the MTA and other agreements, provided Daewoo Korea with "substantial assistance" in breaching that duty. To grant Daewoo America relief on this claim, the court would have to find that the asset transfer itself was a tortious act, constituting a breach of Daewoo Korea's fiduciary responsibilities.

The Eighth Claim, Unauthorized Post-Petition Transfer, is brought against all of the defendants.[20] The claim is that Daewoo America's property, namely Daewoo America's exclusive right to sell and distribute Daewoo automobiles in the United States, was unlawfully transferred to the defendants after

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[20] 11 U.S.C. § 549 states, in relevant part:

> (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate –
>
> (1) that occurs after the commencement of the case; and
>
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

11 U.S.C. § 549.

Daewoo America filed for bankruptcy relief in the California bankruptcy court. Similarly, the Ninth and Tenth Claims, Violation of the Automatic Stay (against all defendants and GM, respectively), assert that Daewoo America's exclusive distribution rights were given away when the automatic stay specifically forbade "any acts to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

In each of these four claims, Daewoo America points to the asset transfer itself as the illicit conduct. It cites no additional conduct in support of these claims. The Korean bankruptcy court approved the MTA and incorporated it into Daewoo Korea's reorganization plan. Thus, Daewoo America cannot attack the MTA without also attacking the Bankruptcy court's approval of it; the two are inextricably intertwined. With respect to these claims, I therefore agree with the court that they amount to nothing more than a collateral attack on the Korean bankruptcy court's orders. Indeed, in contending that it has "no adequate remedy at law" for the harm the asset transfer has caused and asking that "the unauthorized post-petition transfer be set aside," Daewoo America reveals that the objective of these claims is the unwinding of the asset transfer.

I am satisfied that international comity is an appropriate basis for disposing of these four claims. Given the manner in which Daewoo America has pleaded them, the district court would have no choice but to reevaluate the decisions by the Korean bankruptcy court. As the court aptly states, "granting the relief sought would require the [district] court to set aside the asset transfer to the defendants, which was approved by the Korean court." *Ante* at [16a]. Such a collateral attack should not be entertained, and the district court's abstaining from deciding the merits of these claims in no measure constituted an abuse of discretion.

III.

I turn now to what I consider is the appropriate manner in which to address the remaining issues presented by this appeal. When deciding whether a plaintiff's claims should be dismissed, we must view the complaint in the light most favorable to the plaintiff and accept the well-pleaded facts as true. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974); *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.,* 795 F.2d 948, 953 (11th Cir. 1986). A court "may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Marshall County Bd. of Educ. v. Marshall County Gas Dist.,* 992 F.2d 1171, 1174 (11th Cir. 1993) (citing *Executive 100, Inc. v. Martin County,* 922 F.2d 1536, 1539 (11th Cir. 1991)).

The claims in this case can be grouped into three core theories of recovery,[21] each of which turns on Daewoo America's interpretation of the Distribution Agreement. In the first group, Daewoo America's theme is that GM, in purchasing the Daewoo Korea Plants, and the defendants, in subsequently distributing and selling vehicles and parts manufactured by those plants, misappropriated Daewoo America's distribution rights granted by the Distribution Agreement. I label this the "Conversion Theory." In the second group, Daewoo America asserts that the Distribution Agreement guaranteed it a continuous supply of vehicles and parts, even after GM and its

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[21] As I indicated in the previous section, Daewoo America's Sixth Claim (Unfair Competition), Twelfth Claim (Illegal Conduct Related to Motor Vehicle Business), and Thirteenth Claim (Constructive Termination of the Distribution Agreement) are, for the most part, derivative claims, for which the other illegal conduct alleged in the Amended Complaint will sustain a cause of action. These claims are legally insufficient because Daewoo America's other claims are legally insufficient.

partners purchased the Daewoo Korea Plants. I label this the "Continuous Supply Theory." In the third group, Daewoo America's theme is that it had the right to stop (or at the very least, to challenge) Daewoo Korea's sale of the Daewoo Korea Plants to GM and its partners, but gave up that right based on GM's promises. I call this the "Fraud Theory." Because I agree that international comity adequately resolves the "Conversion Theory" claims (the Fourth, Eight, Ninth, and Tenth claims of the Amended Complaint), I do not address their merits. I analyze the remaining theories in turn.

A.

The Second, Third, Fifth, Seventh, Eleventh, and Fourteenth claims rely on the Continuous Supply Theory. Daewoo America contends that the Distribution Agreement entitles it to receive and distribute vehicles from the Daewoo Korea Plants until at least 2009. From its perspective, Daewoo America still has the right to receive and distribute vehicles made in the Daewoo Korea Plants, despite the fact that Daewoo Korea no longer makes Daewoos for sale in the United States. Indeed, Daewoo America acknowledges that its distribution rights are not affected by the distribution and sale of just "*any* vehicle that happens to be manufactured by GMDAT or branded Chevrolet or Suzuki," only those manufactured in the Daewoo Korea Plants. Reply Brief of Appellant at 6-7 (emphasis in original) (internal quotations omitted). Moreover, when the defendants distribute those vehicles under the Chevrolet and Suzuki brands, Daewoo America insists that its right to delivery of vehicles is further denied.

The Second Claim, Tortious Interference with Contract, paints the asset transfer as disruptive of the Distribution Agreement, under which Daewoo Korea had an obligation to provide Daewoo America with vehicles. The acquisition of the Daewoo Korea Plants caused Daewoo Korea to be unable to

deliver cars to Daewoo America. Am. Compl. ¶ 76. This inability, in turn, interfered with Daewoo America's dealership agreements, under which the vehicles were distributed in the United States. *Id.* The assumption underlying this claim is that Daewoo Korea's inability to provide Daewoo America with cars, breaches the terms of the Distribution Agreement.

The Third Claim accuses GM of tortiously interfering with Daewoo America's prospective economic advantage, "through its fraudulent misrepresentations and omissions." Am. Compl. ¶ 84. GM's purported misrepresentations aside, the prospective opportunities Daewoo America claims to have lost exist only if it had a right to be supplied with vehicles after Daewoo Korea's reorganization and asset sale. In other words, absent the right to a supply of vehicles on which to build its distribution and service network, Daewoo America has no prospective business opportunities to be injured.

Daewoo America's Fifth Claim asserts that the defendants violated California's Cartwright Act, which prohibits agreements among individuals or companies that restrain or eliminate trade. *See Lowell v. Mother's Cake & Cookie Co.*, 144 Cal. Rptr. 664, 671 (Cal. Ct. App. 1978). According to Daewoo America, the defendants conspired to eliminate competition in the United States Daewoo distribution market[22] by executing the MTA (*i.e.*, taking control of the exclusive means of Daewoo parts and vehicle production), and by

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[22] I assume that the United States Daewoo distribution market is a valid relevant market for the purpose of sustaining a Cartwright Act claim. *See Exxon Corp. v. Superior Court*, 60 Cal. Rptr. 2d 195, 201 (Cal. Ct. App. 1997) ("Ordinarily, a plaintiff [attempting to show a significant and unreasonable restraint on trade under the Cartwright Act] must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly." (citation omitted) (internal quotation marks omitted)).

depriving it of Daewoo vehicles. Am. Compl. ¶ 100.[23] This deprivation of vehicles presumably harmed Daewoo America and its consumers by freeing defendants to "prevent competition, limit or reduce production, or increase prices." Am. Compl. ¶ 106. Daewoo America posits that, by operation of law, it has the right to compete in the relevant market, which requires the defendants to supply it with vehicles.

The Seventh Claim, Successor Liability, attempts to place GMDAT in Daewoo Korea's shoes, making GMDAT responsible for Daewoo Korea's alleged breach of the Distribution Agreement. Again, Daewoo America focuses on the loss of its vehicle supply, stating that Daewoo Korea's asset transfer to GMDAT was an attempt to escape its "debts and liabilities to [Daewoo America] . . . leaving [Daewoo America] with an insolvent shell with no Daewoo vehicles or parts to distribute." Am. Compl. ¶ 122. GMDAT can only be responsible for the supposed "debts and liabilities" if Daewoo Korea's obligation to deliver cars to Daewoo America did not terminate with the transfer of its assets to GMDAT.

The Eleventh and Fourteenth Claims allege that Daewoo America has been unable to obtain vehicles to distribute because GM excluded it from the assets it acquired via the MTA. Am. Compl. ¶ 145, 163. According to Daewoo America, its inability to obtain Daewoo automobiles, coupled with the defendants' subsequent sale and distribution of "rebadged" Daewoos, constructively terminated the Distribution Agreement and Daewoo America's franchise agreements with its dealer network. This is only problematic, of course, if GM has some obligation to assist Daewoo America to perform its contracts.

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[23] To the extent Daewoo America challenges the *purchase* of the assets as anticompetitive, this is a claim that should have been raised during the course of the Korean bankruptcy proceeding. I interpret the claim, however, to be a challenge to defendant's refusal to deal with Daewoo America once the assets had been purchased.

Finally, in the Thirteenth Claim, Constructive Termination of the Distribution Agreement, Daewoo America contends that GM's conduct, as described throughout the Amended Complaint, terminated the Distribution Agreement and its ability to receive and distribute Daewoo vehicles. "GM's illegal conduct caused [Daewoo America] to suffer pecuniary loss or to be otherwise adversely affected, by virtue of the fact that [its] distribution agreement was discontinued, cancelled, not renewed, modified or replaced." Cutting off its supply of Daewoo automobiles may have injured Daewoo America, but it is only tortious if Daewoo America had a right not to be injured. Stated differently, unless GM's decision to exclude Daewoo America from the United States Daewoo distribution network denied Daewoo America a right it had to be part of that network, GM's conduct was not tortious.

Daewoo America's right to receive Daewoo vehicles from Daewoo Korea and distribute them in the United States was created by the Distribution Agreement. Accordingly, that agreement is the only basis on which Daewoo America can legitimately claim it has any right to a continuing supply of vehicles.[24]

In Daewoo America's view, "[n]othing in the contract supports . . . a reading" that it "had the exclusive U.S. distribution rights to a vehicle model *only* so long as that model was manufactured by [Daewoo Korea]." Brief of Appellant at 31-32. Daewoo America observes that "the Distribution Agreement conferred on [it], for ten years, the rights not only (1) to serve as the United States distributor of the Covered

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[24] Daewoo America's Cartwright Act claim relies on the presumption that GM (or GMDAT) had a statutory obligation to use Daewoo America as a distribution channel. Anything else would be an unreasonable restraint on trade. I simply disagree.

products;[25] and (2) to do so exclusively, but also (3) to receive a supply of the Covered products needed to carry out its role as the exclusive U.S. distributor." *Id.* at 31. Daewoo America also rightly points out that "the Distribution Agreement broadly prohibited [Daewoo Korea] from permitting third parties to sell the Covered products in the United States or otherwise circumventing [Daewoo America]'s exclusive distribution rights." *Id.* at 32-33.

That the Distribution Agreement contains these rights and obligations is not disputed by the defendants. This, however, is not the question. Rather, the question is whether Daewoo Korea either promised not to sell the Daewoo Korea Plants if the prospective buyer refused to assume its responsibilities under the Distribution Agreement or, alternatively, whether Daewoo Korea guaranteed that Daewoo America would be provided with vehicles and parts regardless of who owned the Daewoo Korea Plants. The answer rests on the definition of two key terms in the Distribution Agreement: "Seller" and "Product."

The plain language of the Distribution Agreement designates Daewoo Korea as the "Seller" of "Products," and Daewoo America as the "Buyer" and exclusive United States distributor of those Products. The term "Seller" refers solely to Daewoo Korea; it makes neither specific nor general reference to any other entity of any kind. Daewoo America argues that its rights cannot be limited solely to "Seller's" Products because "[t]he Distribution Agreement does not state that [Daewoo America] will have exclusive U.S. distribution rights 'so long as the Products are manufactured by [Daewoo Korea]' or 'so long as the Products bear the "Daewoo" trademark.' " *Id.* at 32. This

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[25] The term "Covered products" is one of Daewoo America's own creation, and is intended to denote any vehicles manufactured in the Daewoo Korea Plants over which Daewoo America claims distribution rights. The term appears nowhere in the Distribution Agreement.

argument is belied by the language of the agreement: "Seller is the exclusive worldwide distributor of the Products (as defined in Section 1), *which are manufactured by Seller*." Doc. 144, Ex. 7 (emphasis added). Daewoo America essentially argues that Daewoo Korea intended to impart distribution rights to vehicles not mentioned in the Distribution Agreement, which Daewoo Korea did not manufacture, and over which Daewoo Korea exercised no control, simply because the Distribution Agreement does not state otherwise. This assertion is nothing if not incredible.

The Distribution Agreement defines the term "Products" as "the motor vehicles provided on Exhibit A attached hereto (as said Exhibit A may be amended from time to time by Seller to add or delete motor vehicle models) and the parts, accessories and equipment therefor." Although the parties neglected to attach Exhibit A to the Distribution Agreement, nothing in this definition or the remainder of the Distribution Agreement suggests that the Products will be provided by anyone other than the Seller (namely, Daewoo Korea). It is to these Products that Daewoo America's exclusive distribution rights attach, and no others; the agreement does not address other brands or types of vehicles, nor does it make reference to other manufacturers.

In sum, the plain language of the Distribution Agreement contains no guarantee that Daewoo America would continue to receive Products after Daewoo Korea ceased manufacturing them, nor does the agreement restrict Daewoo Korea's ability to sell its manufacturing assets. Again, Daewoo Korea's assets are not mentioned in the agreement at all. To the extent Daewoo America's claims rely on the existence of such guarantees, they must fail.

B.

According to the First Claim for fraud, GM falsely represented that it would continue the Daewoo distribution

relationship Daewoo America enjoyed with Daewoo Korea. Daewoo America believes that GM made this false promise to "encourage [it] not to take any action that might interfere with GM's acquisition plans." Am. Compl. ¶ 68. To be clear, Daewoo America does not allege that GM specifically offered to engage Daewoo America as the exclusive United States Daewoo distributor in exchange for Daewoo America's acceptance of the MTA or the Modified Plan; such an allegation appears nowhere in the Amended Complaint. Rather, Daewoo America simply claims that it abandoned its right to "oppose the acquisition" in reasonable reliance on GM's supposed misrepresentations.

Analyzing the terms of the Distribution Agreement does not lead to the conclusion that Daewoo America had any right to prevent Daewoo Korea from selling its assets to GM. As already shown, the Distribution Agreement neither expressly nor impliedly provides Daewoo America with any rights respecting the disposition of Daewoo Korea's property. Moreover, Daewoo America has offered no theory, legal or otherwise, on which the court could infer the existence of such a right. As such, Daewoo America cannot prove that GM's alleged misrepresentations caused it any harm. It cannot show that, even if it had opposed the asset sale, the Korean bankruptcy court would have ruled differently.[26] Accordingly, Daewoo America's fraud claim cannot stand.

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[26] Daewoo America's other claimed harms, including its lost opportunity "to cover its positions and/or explore[ ] other business" ventures, Am. Compl. ¶ 69, are simply too vague. *See* Fed. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

IV.

I share the court's view that Daewoo America is simply attempting to return itself to its former position as exclusive United States Daewoo distributor, in complete disregard for the time and substantial effort that the Korean bankruptcy court expended in managing Daewoo Korea's reorganization. Nevertheless, it is patently clear that the court, like the district court, rushed into abstention, dismissing Daewoo America's Amended Complaint in its entirety when, in fact, the international comity doctrine has only limited application. I believe such judicial expediency to be unnecessary, especially considering that "[f]ederal courts have a 'virtually unflagging obligation' to exercise the jurisdiction conferred upon them." *Turner Entm't Co. v. Degeto Film GmbH,* 25 F.3d 1512, 1518 (11th Cir. 1994) (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976)). I would therefore analyze the claims presented by Daewoo America and, because they lack substance, dismiss them.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:04-cv-201-Orl-31KRS

DAEWOO MOTOR AMERICA, INC.,

Plaintiff,

vs.

GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION,
GM DAEWOO AUTO TECHNOLOGY CO.,

Defendants.

ORDER

This cause comes for the Court's consideration on the following:

1) General Motors Corp.'s ("GM") Motion to Dismiss (Doc. 73), Memorandum in Support thereof (Doc. 121); GM Daewoo Auto & Technology Co.'s ("GMDAT") Supplemental Memorandum (Doc. 127); and American Suzuki Motor Corp.'s ("American Suzuki") Supplemental Memorandum (Doc. 129). In addition, Daewoo Motor America ("DMA") filed a Response (Doc. 138) and Supplemental Brief (Doc. 139), and GM filed a Reply (Doc. 147). GMDAT also filed a Response (Doc. 149).

2) Suzuki Motor Corp.'s ("Suzuki") Motion to Dismiss (Doc. 136) and Memorandum in Support thereof (Doc. 137),

and DMA's Response thereto (Doc. 140). In addition, DMA filed a Memorandum in Opposition (Doc. 145), and Suzuki filed a Reply (Doc. 150) and Supplemental Brief (Doc. 151).

The Court heard oral argument on August 20, 2004.

I. Background

DMA was incorporated in Delaware[1] on June 30, 1997, as a wholly owned subsidiary of Daewoo Motor Co., Ltd. ("DWMC"), a South Korean automobile manufacturer. DMA served as the exclusive distributor of Daewoo automobiles in the United States, and provided exclusive warranty services and replacement parts to U.S. Daewoo dealers.[2]

On November 18, 1999, DMA and DWMC entered into an Automobile Purchase and Distribution Agreement ("the Distribution Agreement").[3] Under this Agreement, DWMC (the "Seller") agreed to sell to DMA (the "Buyer") certain "Products," and granted to DMA "the exclusive right to distribute, sell, rent, lease and otherwise dispose of and service,

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[1] DMA's principal place of business is in California.

[2] DMA entered into Dealer Sales and Services Agreements with numerous dealers nationwide. (*See, e.g.*, Doc. 122, Ex. 3).

[3] Prior to the execution of the Distribution Agreement, on January 1, 1998, DMA entered into a Trademark License Agreement ("Trademark Agreement") with DWMC's predecessor in interest. (Doc. 144, Ex. 10). The Trademark Agreement was executed in conjunction with an Original Distribution Agreement that was superceded by the Distribution Agreement. Under the Trademark Agreement, DWMC granted to DMA the non-exclusive right to use the Daewoo trademark in the United States in connection with the sale of Daewoo vehicles and parts. Also on January 1, 1998, DWMC's predecessor in interest entered into a Supply Commitment Agreement ("Supply Agreement") with PPM Finance, Inc. ("PPM"), its principal lender. (Doc. 144, Ex. 9).

directly or through one or more subsidiaries or independent contractors, the Products in the United States and all territories and possessions thereof." (Doc. 144, Ex. 7) (parenthetical information omitted).[4] The Agreement further provided:

> Whereas, Seller is the exclusive worldwide distributor of the Products (as defined in Section 1), which are manufactured by Seller;
>
> Whereas, Seller, as exclusive worldwide distributor has the right to grant to others the exclusive right to sell the products in certain regions, including the Territory (as defined in Section 2);
>
> Whereas, Buyer is the wholly owned subsidiary of Seller;
>
> . . .
>
> . . . Seller hereby agrees to sell to Buyer and Buyer hereby agrees to purchase from Seller the Products for resale or for rental or lease in the Territory. For purposes of this Agreement, "Products" shall mean the motor vehicles provided on Exhibit A attached hereto (as said Exhibit A may be amended from time to time by Seller to add or delete motor vehicle models) . . .
>
> . . . Seller shall not Sell or service, directly or indirectly, or permit any other person or corporation, partnership, limited liability company or their entity to Sell or service the Products in the Territory.

The Agreement references "Exhibit A," but the parties agree that no such exhibit ever existed and therefore never was "attached."

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[4] A copy of the Distribution Agreement was attached to the Declaration of current DMA President Yeong Soo Hong (Doc. 144) as Exhibit 7.

In the late 1990s, DWMC began to suffer financial hardship. Thus, on November 10, 2000, DWMC filed for protection in Korea under the Korean Corporate Reorganization Act ("CRA"),[5] and the Korean Court appointed a Receiver.

DWMC notified DMA of its insolvency and plans to file for court receivership. (Doc. 123, Ex. 6). The notification included a summary of Korean bankruptcy law as well as statements indicating that creditors must participate in the reorganization plan to be repaid and that failure to file a claim would result in the loss of that creditor's rights. (*Id.*). DMA in turn notified the U.S. dealers with whom it had Dealer Agreements of DWMC's insolvency.[6] During this initial phase of insolvency, DMA remained the exclusive distributor of Daewoo vehicles in the United States.

In December 2000, DWMC and the Receiver sent to DMA separate reminders to file a claim by January 15, 2001, a deadline established by the Korean Court. (Doc. 123, Ex. 8; Doc. 124, Ex. 9). In January 2001, DMA's then President Dong Jin Lee wrote DWMC to request assistance with claim filing. (Doc. 124, Ex. 10; *see also* Hong Depo.[7] Ex. 5 and at 54-55). With DWMC's aid, DMA retained the law firm Jin & Lee (Doc. 124, Ex 13), and DWMC appointed agents to act on DMA's behalf in the Korean proceedings. DMA did not object to DWMC's appointments (Hong Depo. at 48), and executed a Power of Attorney in favor of Jin & Lee. (Doc. 124, Ex. 10; *see also* Hong Depo. at 56).

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[5] A copy of the CRA was filed as Exhibit 33B to Document 126.

[6] By letter from then DMA President Dong Jin Lee, DMA informed its employees on November 9, 2000, that DWMC was entering into court receivership. (Doc. 123, Ex. 7). DMA touted the move as an "extremely positive step. . . ." (*Id.*).

[7] The Hong Deposition was filed as Documents 133-135.

On January 15, 2001, with the help of Jin & Lee, DMA filed a proof of claim before the Korean Court in the amount of $33 million, and in February 2001, filed a supplemental claim for $45,528,000.00. On February 26, 2001, DWMC's creditors held a meeting at which they reviewed the claims. Jin & Lee attended this meeting on behalf of DMA. The Receiver objected to most of DMA's claims, and the Korean Court therefore sent DMA a Notice of Objection.[8] The Korean Court also informed DMA that it was required to affirm the claims by filing claims against the objector by the end of March. Thus, in preservation of its rights, DMA filed a complaint in the Korean Court against the Receiver and DWMC challenging the objections and seeking approval of its claims. (Doc. 124, Ex. 15). DMA sent a second Power of Attorney to Jin & Lee with regard to the lawsuit. (Doc. 124, Ex. 19). The next month, however, DMA dropped the suit. (Doc. 124, Ex. 20).[9] DMA then filed a second supplemental claim for $1,090,968.00, which the Receiver approved.

At the same time that DWMC entered into receivership, it began acquisition talks with GM. Suzuki allegedly participated in these talks as an "Alliance Partner." (Doc. 153 at 28). On September 20, 2001, DWMC, DWMC's creditors, and GM entered into a non-binding Memorandum of Understanding ("MOU") regarding the sale of certain DWMC assets to GM. The MOU contemplated the formation of a new company that would own and operate select DWMC domestic and foreign assets and businesses. On September 26, 2001, the Korean Court approved the MOU.

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[8] The Receiver objected to all but about $1,344,291.00 of the claims.

[9] Hong testified that DMA filed and withdrew its lawsuit against DWMC based on DWMC's instructions, but Hong also testified that DMA did not object to these instructions, and carried them out willingly. (Hong Depo. at 101-102).

On April 30, 2002, DWMC and certain creditors signed and negotiated in Korea a Master Transaction Agreement ("MTA") with GM.[10] Under the MTA, "Newco A" (later known as GMDAT) would receive the exclusive right to distribute Daewoo vehicles and use the Daewoo trademark worldwide. Further, the MTA provided that assets would not be transferred until the Korean Court approved it and confirmed a reorganization plan that was consistent with its terms.

Days later, DWMC sought to terminate its Distribution Agreement with DMA, alleging material breach due to non-payment of $132 million.[11] On May 6, the Korean Court issued an order approving DWMC's Termination of the Distribution Agreement. (Doc. 143, Ex. 2). The Receiver also sent DMA a letter informing it of the material breach and giving DMA a 30-day cure period. (*See* Doc. 143, Ex. 3).[12]

Around the same time, on May 6, 2002, DWMC creditors held a meeting to approve the Reorganization Plan. By proxy executed by DMA, DWMC employee Han Su Pyon attended the meeting on DMA's behalf, voting in favor of this original Reorganization Plan. (Doc. 143, Ex. 9).

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[10] The final Closing of the Transaction Pursuant to the Master Transaction Agreement occurred on October 17, 2002.

[11] DMA disputes this breach, and claims that, pursuant to the Supply Agreement, DWMC could not terminate the Distribution Agreement until PPM had been paid.

[12] The letter asked DMA to pay the overdue amount, and stated, "Unless such payment is made within 30 days from the receipt hereof, the Distributorship Agreement shall be terminated." (Doc. 143, Ex. 3).

On May 16, 2002, DMA filed for bankruptcy in the Central District of California.[13] The California Bankruptcy Court granted a motion by the Official Committee of Unsecured Creditors of DMA for leave to be appointed to prosecute claims against DWMC. (Doc. 148, Ex. A).[14] In addition, pursuant to 11 U.S.C. § 362(a) and (c), a stay was automatically put in force to prevent any acts against DMA to take possession of or exercise control over DMA's assets.

On September 12, 2002, DWMC filed with the Korean Court a Modified Plan of Reorganization ("Modified Plan" or "Modified Reorganization Plan"), which incorporated the terms of the MTA. The Modified Plan differed from the original plan in that it provided for the sale of certain assets but not for the inclusion of DMA and its network of dealers. On September 30, 2002, DWMC creditors held another meeting to vote on the Modified Plan. Although DMA had notice of this meeting[15] and could have executed another proxy in favor Pyon to vote on DMA's behalf on the Modified Plan (Doc. 126, Ex. 31), no representative of DMA attended the meeting nor voted on the Modified Plan. The Korean Court approved the Modified Plan and the incorporated MTA on September 30. Thereafter,

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[13] DWMC obtained approval from the Korean Court for DMA to file Chapter 11 Bankruptcy in the United States. (*See* Doc. 143, Ex. 1).

[14] Andrew Bloomer filed a Supplemental Affidavit at Document 148.

[15] On September 17, 2002, DWMC sent a letter to creditors informing them of the meeting on September 30, to discuss proposed changes to the Reorganization Plan. (Doc. 125, Ex. 32). In addition, DWMC sent to DMA a letter on September 19, 2002, informing DMA of the September 30 meeting. (Doc. 126, Ex. 31).

GMDAT was formed, and it acquired certain assets from DWMC. (*See* Doc. 123, Ex. 5C).[16]

GM elected to maintain the Daewoo brand name in places like Korea, where it did not have an established dealership network. In the United States, however, GM eliminated the Daewoo brand name but continues to sell the former Daewoo automobiles at U.S. GM dealerships under other brand names, including Suzuki and Chevrolet.

DMA alleges that Defendants' actions have caused the *de facto* termination of the Distribution Agreement, destroyed business opportunities, and caused DMA to fail to meet its contractual obligations with its U.S. dealers. In 2003, DMA sued Defendants in California Bankruptcy Court. Upon transfer by the Multidistrict Litigation Panel, the case now stands before this Court on the two motions to dismiss the First Amended Complaint.[17]

In the First Amended Complaint, DMA alleges against GM the following Counts: (I)[18] Fraud; (II) Tortious Interference with Contract; (III) Tortious Interference with Prospective Economic Advantage; (IV) Aiding and Abetting Breach of Fiduciary Duty; (X) Violation of the Automatic Stay, 11 U.S.C. § 362; (XII) Illegal Conduct Related to Motor Vehicle Business, Florida Statute § 320.64(4); and (XIII) Constructive Termination

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[16] A copy of the Newco A Asset Transfer and Liability Assumption Agreement ("ATA") was filed as Exhibit 5C to Document 123.

[17] Judge Sheri Bluebond of the California Bankruptcy Court dismissed several claims of the original complaint and allowed DMA to file an amended complaint. The First Amended Complaint was filed herein at Document 153.

[18] The Roman numerals correspond with the Count numbers in the First Amended Complaint.

of Distribution Agreement, Mass. Stat. 93B § 4(c)(12). Against all Defendants, DMA alleges: (V) Violation of the Cartwright Act, Cal. Bus. & Prof. Code § 16720 et seq.; (VI) Unfair Competition, Cal. Bus. & Prof.Code § 17200; (VIII) Unauthorized Post-Petition Transfer, 11 U.S.C. § 549; (XI) Constructive Termination of Distribution/Franchise Agreements, Florida Statute § 320.641; and (XIV) Constructive Termination of Distribution Agreement, Mass. Stat. 93B § 5. Finally, DMA alleges against GMDAT (VII) Successor Liability.

II. Standard of Review and Analysis

A. Validity of Korean Court's Orders

Defendants seek to dismiss all claims based on principles of comity. The comity doctrine applies only to "valid" orders of a foreign court. DMA challenges the validity of certain Korean Court orders, and hence this Court will begin its analysis here.

Specifically, DMA contends that the Korean Court's orders regarding the Modified Reorganization Plan and the MTA, which were issued after May 16, 2002 (the date on which DMA filed for bankruptcy), affected DMA's property rights under the Distribution Agreement[19] and are therefore void for taking action against the property of the debtor's estate in violation of the automatic stay under 11 U.S.C. § 362. *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992) (actions taken in violation of

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[19] DMA asserts that, pursuant to the MTA and Modified Reorganization Plan, DWMC conveyed to GM the exclusive right to use the Daewoo brand and trademark, and that the MTA and Modified Plan empowered third parties to distribute former Daewoo products in the United States in violation of its exclusive rights under the Distribution Agreement.

automatic stay are void);[20] *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982) (same). DMA further asserts that Defendants' actions of rebadging Daewoos and selling them in the United States under Chevrolet and Suzuki brand names constitute acts to obtain possession of, or exercise control over, property of the DMA estate.

Under § 362(a), upon commencement of a bankruptcy case in the United States, an injunction is automatically and immediately imposed, and said injunction stays all actions against a debtor and all acts that affect possession or control over property of the debtor's estate.[21] 11 U.S.C. § 362(a); *see In re Krystal Cadillac Oldsmobile GMC Truck, Inc.*, 142 F.3d 631, 637 (3d Cir. 1998). While the Court agrees with DMA that the protections of § 362(a) apply extraterritorially, *see In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998),[22] *Underwood v. Hilliard (In*

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[20] Because this case has foreign relations implications and involves federal bankruptcy matters, federal law applies. To the extent it becomes relevant, the law of the Ninth Circuit controls, for the Multidistrict Litigation Panel transferred this case to this Court from California Bankruptcy Court for pre-trial matters.

[21] The property of a bankruptcy estate includes the debtor's legal or equitable interests in property on the date of the commencement of the bankruptcy proceeding. 11 U.S.C. § 541(a)(1).

[22] In Simon, the court assessed whether an injunction issued pursuant to 11 U.S.C. § 524(a)(2), which prohibits collection actions against the estate, had extraterritorial application. The Simon court stated:

> As applied to the concept of in rem bankruptcy jurisdiction, there is no functional difference between the automatic stay imposed by 11 U.S.C. § 362 upon the commencement of a bankruptcy and the injunction prohibiting collection actions against the bankruptcy estate provided in 11 U.S.C. § 524(a)(3). Each stay operates to protect the estate and the *in rem* jurisdiction of the bankruptcy court. Accordingly, we join the

re Rimsat, Ltd.), 98 F.3d 956, 961 (7th Cir. 1996), the salient question herein is not whether the stay extends to property located outside the United States, but rather whether the Korean Court's orders adversely affected any of DMA's property rights under the Distribution Agreement.[23] In this regard, Defendants contend that, pursuant to the Distribution Agreement, DMA had the right to distribute Daewoo products manufactured by DWMC, not GMDAT, and that therefore the rights under the Distribution Agreement differ from the rights transferred under the MTA and the Modified Reorganization Plan. As a result, argue Defendants, the Korean Court's orders approving the MTA and Modified Reorganization Plan did not take action against any property of DMA's estate.

The Court begins by looking to the plain terms of the Distribution Agreement. *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 910 (9th Cir. 2003) ("Under federal law, a written contract must be read as a whole and every part interpreted with

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> Seventh Circuit's logic [in *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956, 961 (7th Cir. 1996)] and hold that a bankruptcy court may validly exercise its in rem jurisdiction to protect estate property wherever the property is located in issuing a discharge injunction under 11 U.S.C. § 524. Thus, the district court correctly held in this case that the 11 U.S.C. § 524 discharge enjoined [the plaintiff-appellant] from commencing collection against any bankruptcy estate property regardless of its geographic location.

Id. at 996.

[23] Without ruling, the Court assumes for purposes of this Order that the Distribution Agreement was not terminated by DWMC's Notice of Termination filed in the Korean Court and the subsequent running of the 30-day cure period. The Court questions, however, why DWMC would have attempted to terminate the Distribution Agreement if it had no relevance to its corporate reorganization, but that inquiry is not important herein.

reference to the whole, with preference given to reasonable interpretations. Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first.") (internal quotations and citations omitted); *Krystal Cadillac*, 142 F.3d at 635 (looking at contract as first step in assessing whether agreement was in effect and thus constituted property of the estate). The Distribution Agreement unambiguously contemplates DWMC as the Seller, and DMA as the Buyer with the exclusive right to distribute certain DWMC "Products."[24] Defendants argue that the Distribution Agreement also unambiguously contemplates that DMA would distribute only those cars manufactured by DWMC and therefore would not extend to cars manufactured by GMDAT.

Regardless of the definition of "Products," the contract contains no language to suggest that DMA has a broad right to sell or distribute any car manufactured by DWMC or its successors. Rather, the terms of the contract suggest only that DMA had the exclusive right to sell or distribute the "Products" of "Seller" (that is, DWMC) and that DMA had the exclusive right to distribute Daewoo vehicles (not Suzuki or Chevrolet vehicles) in the United States.[25] Based on the plain language of

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[24] Although the term "Products" apparently was intended to encompass vehicles and parts manufactured by DWMC, it is not otherwise defined, and as explained supra, Exhibit A was never attached. Whatever this term includes, the contract expressly reserves in DWMC the right to change or delete the "Products" at any time. (*See* Doc. 144, Ex. 7).

[25] Further, the Court takes judicial notice of the complaint filed as an adversary proceeding by DMA in Chapter 11 Case No. 02-24411BB pending before U.S. Bankruptcy Judge Sheri Bluebond. (Doc. 158, Ex. 1). Paragraph 14 of that complaint reads as follows:

Beginning on or about January 1, 1998, the Debtor and DWMC

the Distribution Agreement, the Court finds that DMA does not have property rights to distribute the vehicles currently manufactured by GMDAT[26] and sold in the United States under the Suzuki and Chevrolet brand names.[27] To construe the Distribution Agreement in the manner DMA suggests, the Court would have to find that the Agreement gave DMA the exclusive right in perpetuity to distribute in the United States any and all vehicles made by DWMC or its successors. Nothing in the

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> entered into various agreements whereby DWMC granted the Debtor the exclusive right to purchase Daewoo vehicles and products *manufactured by DWMC* for distribution within the United States. . . .

Id. (emphasis added). The Court also takes notice of a letter sent to GM Counsel Andrew Bloomer by DMA Bankruptcy Attorney Theodore Stolman, in which Stolman wrote, "DMA holds the exclusive rights to distribute *Daewoo* automobiles and parts within the United States and its territories." (Doc. 126, Ex. 34).

[26] Issues of successor liability are discussed below.

[27] Judge Stephen Robinson addressed similar arguments in *Subaru Distributors Corp. v. Subaru of America, Inc. et al.*, Case No. 03-Civ-9608 (SCR) (S.D.N.Y. June 23, 2004). Judge Robinson rejected the contention of Subaru Distribution Corp. ("SBC") – the equivalent of DMA herein – that the distribution agreement and amending memorandum of understanding gave SBC the right to distribute Subarus rebadged as Saabs. In that case, however, the products at issue were expressly defined in the contract whereas in the instant case, the Agreement is effectively silent on the definition of "Products." *See also Volvo Trademark Holding Aktiebolaget v. CLM Equip. Co.*, 236 F. Supp. 2d 536, 553 (W.D.N.C. 2002) (finding, with regard to a breach of contract claim, that the plain language definition of "products" in the dealership agreement clearly referred to accessories manufactured by Champion Road under its own mark, not to any product manufactured by Champion regardless of trademark thereon).

contract suggests such a reading, and indeed such a reading strains credulity.

As set forth in the MTA and as approved in the Modified Reorganization Plan, GM/GMDAT acquired certain manufacturing assets and rights of DWMC's.[28] The property rights under the MTA are wholly different from DMA's contract rights under the Distribution Agreement.[29] Because DMA does not, by virtue of the Distribution Agreement,[30] possess the exclusive right to sell GMDAT-manufactured cars, the Korean Court's orders approving the MTA and Modified Reorganization Plan did not affect any property of DMA's estate and did not violate the automatic stay.[31]

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[28] For a detailed list of DWMC assets acquired by GMDAT, *see* the ATA. (Doc. 123, Ex. 5C).

[29] As noted previously, the Distribution Agreement was not assigned to GMDAT. Rather, DWMC sought to terminate it.

[30] To the extent DMA argues that it also possesses exclusive rights under the Trademark Agreement when read in conjunction with the Distribution Agreement and Supply Agreement, the Court finds that the argument fails. The Trademark Agreement expressly states it is a non-exclusive license, and this Court will not alter the unambiguous terms of that contract.

[31] This ruling comports with Judge Bluebond's "Tentative Ruling" of July 30, 2003. In that ruling, she stated:

> The Distribution Agreement did not give the debtor a right to distribute in the United States any vehicles ever manufactured at any plant then owned by the Korean parent, regardless of who owns the facility or who does the manufacturing. The Korean parent had the right to stop producing Daewoo vehicles without breaching the contract. The Korean parent also had the right to sell some or all of its assets to a third party who wasn't bound by the distribution agreement. (Moreover, it is not clear that the proposed conduct would violate the distribution agreement even

Having found that the Korean Court's orders did not violate the automatic stay, the Court now turns to the broader question of comity.

C. Comity

Hilton v. Guyot, 159 U.S. 113 (1895), set forth the general principle of comity as this:

> where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Id. at 158. Comity is discretionary; it is not a rule of law, but a rule of practice, convenience, and expediency. *Id.* at 163-64 ("Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its

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if GMDAT were bound by it.).

(Doc. 126, Ex. 36).

laws."); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-38 (11th Cir. 2004); *Remington Rand Corp.-Del. v. Bus. Sys. Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971). Generally, a court should evaluate: "(1) whether the foreign court was competent and used 'proceedings consistent with civilized jurisprudence,' (2) whether the judgment was rendered by fraud, and (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just." *Ungaro-Benages*, 379 F.3d 1227, 1238-39 (internal citations omitted).

Analyzing whether comity applies to a foreign judgment[32] bears similarity to analyzing whether res judicata applies to a domestic judgment. *International Trans., Ltd. v. Embotelladora Agral Regiomontana*, 347 F.3d 589, 593 (5th Cir. 2003). "Essentially, once the parties have had an opportunity to present their cases fully and fairly before a court of competent jurisdiction, the results of the litigation process should be final." *Id.* (citations omitted).

In the bankruptcy context, the doctrine is especially applicable, for comity enables a debtor's assets to be dispersed equitably and systematically rather than haphazardly or erratically. *Id.* at 593-94; *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1149 (5th Cir. 1990). In this case, GM claims that: 1) the Korean proceedings occurred before a court of competent jurisdiction; 2) DMA had actual notice of and participated in those proceedings; 3) DMA consented to the reorganization plan and asset transfer; 4) the Korean Court procedures are consistent with U.S. bankruptcy law principles; 5) recognition of the Korean proceedings and orders promotes the orderly distribution of assets and resolution of claims related

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[32] To grant comity, a judicial act need not be a final judgment. *Remington*, 830 F.2d at 1266.

to the insolvent company; and 6) DMA's claims amount to an improper collateral attack on the MTA and Modified Reorganization Plan. The Court will address these arguments below.

1. Due Process Concerns

a. Similarity of Korean and U.S. Bankruptcy Laws

In looking to the laws of Korea to ensure they comport with U.S. notions of fairness and due process, such as notice and an opportunity to be heard, the Korean laws need not be identical to the laws of the United States. *International Trans.*, 347 F.3d at 594 (internal citations omitted); *In re International Admin. Servs.*, 211 B.R. 88, 96 (M.D. Fla. 1997) (finding similar though not identical laws of Guernsey provided sufficient procedural safeguards to protect the party's interests). The Court finds that the bankruptcy laws of Korea are substantially similar to the laws of the United States and comport with general notions of due process. *See, e.g. Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999- 1000 (2d Cir. 1993) (rejecting plaintiff's argument that, because Australian bankruptcy law did not provide for an automatic stay,[33] the court should not grant comity, and holding that such minor procedural differences were insufficient to demonstrate prejudice for having to maintain an action in Australia); *In re Kyu-Byung Hwang*, 309 B.R. 842, 846 (Bankr. S.D.N.Y. 2004) (holding that Korean Bankruptcy law, and in particular the CRA, was "substantially similar" to U.S. law and did not discriminate against non-Korean creditors or

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[33] Korean law also does not provide for an automatic stay.

offend U.S. notions of due process).[34] On this subject, there is no serious debate.

b. Control by DWMC

Whether DMA actually enjoyed due process is, however, hotly contested. Defendants contend that DMA enjoyed full participation in and had full notice and opportunity to be heard in the Korean Court insolvency proceedings. DMA alleges that, from the start of the insolvency process until the date it filed for bankruptcy in the United States, it was controlled by DWMC[35] and therefore did not fully and independently participate. The Court rejects DMA's argument, for the record reveals that, despite being a wholly owned subsidiary, DMA had the ability to control its actions throughout DWMC's reorganization, and in fact did exercise significant control. For example, DMA asked DWMC for help in hiring counsel, and DMA in fact retained the law firm of Jin & Lee. DMA executed Powers of Attorney in favor of Jin & Lee, and participated in the

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[34] It is noteworthy, however, that the *Kyu-Byung Hwang* court did not consider reciprocity, as this Court does below. This is likely so because the Second Circuit rejects reciprocity as a factor in the comity analysis. The *Kyu-Byung Hwang* case is helpful to the extent it recognizes Korean insolvency law as generally comporting with U.S. notions of fairness and due process.

[35] DMA alleges in its First Amended Complaint that it was controlled by DWMC until October 16, 2003, (*see, e.g.*, Doc. 153 at 7), but in its papers and depositions filed with the Court, DMA suggests that DWMC ceased control over DMA on May 16, 2002, the date on which DMA declared bankruptcy. (*See, e.g.*, Doc. 138 at 8).

preparation of its claims submitted to the Korean Court[36] as well as the filing and withdrawal of the lawsuit against DWMC.

As is evident, DMA actively sought and obtained independent representation and took steps to preserve its rights throughout the reorganization. DMA cannot now claim that its status as a wholly owned subsidiary rendered it an unrepresented puppet in DWMC's insolvency process.[37] *Cf. International Trans.*, 347 F.3d at 595 (holding that the plaintiff would be bound by notices sent to its agent and that its obligation to act in preservation of its own rights did not cease upon the filing of a claim by its agent).

c. Notice and Participation

DMA also contends it did not receive full notice and did not vote on the Modified Reorganization Plan and therefore did not enjoy full participation. The Court again rejects DMA's argument. The record demonstrates that DMA had notice of all key events from the start of the insolvency until its closing, as well as the opportunity to be heard on all matters, including the Modified Plan. Indeed, DMA knew about the September 30 creditors' meeting at which the Modified Reorganization Plan was to be put to a vote, but voluntarily chose not to attend by

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[36] Hong testified that he prepared the first claim for DMA and submitted it to DWMC. He also testified that Jin & Lee prepared the supplemental claims with information provided by Hong. (*See* Hong Depo. at 42, 45). In addition, then DMA President Lee sent to DWMC the second supplemental claim with the understanding that it would be filed with the Korean Court. (*Id.* at 52).

[37] Corporate conglomerates often have interlocking directors. Plaintiff's argument would have this Court assume that the DMA Board of Directors and its management violated their fiduciary duties to DMA. This Court is not willing to make this assumption.

proxy[38] or otherwise.[39] Because DMA had notice of the Modified Plan, failed to vote on it, and chose not to object to it, DMA effectively consented to the Modified Plan. *See FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 285 (7th Cir. 2002) (suggesting that, where a party has notice, failure to object "counts" as consent).

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[38] In-house DMA counsel Agnes Cha wrote to DMA Bankruptcy Attorney Stolman on September 3, 2002, stating in relevant part: "Attached is proposed Proxy for voting and acceptance to consent confirmation of proposed modification to DWMC's reorganization plan and cover memo from Korea requesting us to execute the Proxy." (Doc. 126, Ex. 34).

[39] In his Declaration (Doc. 126, Ex. 34), Stolman stated:

> On or about September 23, 2002, Lee & Ko . . .a law firm in South Korea that has been retained by the Debtor [DMA] with respect to the insolvency proceeding of [DWMC], advised me that, in light of an upcoming meeting of [DWMC's] creditors to approve [the] revised plan of reorganization, the Debtor should file its claim in [the Korean] insolvency proceeding immediately.

(Doc. 126, Ex. 34). This representation indicates that DMA had notice of the Modified Plan and the September 30 meeting. Indeed, the California Bankruptcy Court appointed the Creditors Committee to act on behalf of DMA, and DMA is bound by any decisions that the Committee made. If the Committee elected not to file a claim, DMA cannot now collaterally attack that decision by suing GM and the other Defendants.

In addition, DMA President Hong testified that DMA did not instruct anyone to attend the September 30 creditors' meeting on its behalf. Further, DMA did not oppose or approve the Modified Plan, and Hong did not tell its appointee to do one thing or the other with regard to the Modified Plan. (*See* Hong Depo. at 126 and 129). Apparently, DMA relied on the assumption that the automatic stay imposed by the filing of its own bankruptcy would trump all further proceedings in the Korean Court.

2. Reciprocity

In determining whether to grant comity, one permissible factor, though not an absolute prerequisite, is whether the foreign court recognizes U.S. judgments. *Remington*, 830 F.2d at 1273 ("Although reciprocity is no longer an absolute condition precedent to comity, it is always a permissible consideration, and here we believe it to be a consideration of extreme importance."); *Her Majesty Queen in Right of Province of Brit. Columbia v. Gilbertson*, 597 F.2d 1161, 1163-64 (9th Cir. 1979)[40] ("Before comity may be extended, generally there is a requirement of reciprocity, which is the principle that the courts of one jurisdiction will recognize a judgment from a second jurisdiction only if the courts of the second jurisdiction would recognize a judgment from the first jurisdiction's courts."); *International Trans.*, 347 F.3d at 597 (Smith, J., dissenting) ("The test [under the *Hilton* case for comity] encourages respect for foreign courts (in hope of reciprocal respect), discourages protracted re-litigation of the same dispute, and ensures procedural fairness for the aggrieved party."); *Corporacion Salvadorena de Calzado v. Injection Footwear Corp.*, 533 F. Supp. 290, 299 (S.D. Fla. 1982) (accepting and adopting Special Master's recommendation that judgment rendered in El Salvador should be denied comity based on the reciprocity rule – "if the rendering state . . . would refuse to recognize a judgment of the State of Florida because of a particular defect, then Florida would refuse to recognize a like judgment rendered by [that state].") (internal citations omitted).

In *Remington*, as here, the court found compelling the fact that Dutch law did not recognize as binding orders of foreign courts. 830 F.2d at 1268. Similarly, the CRA of Korea adopts a

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[40] The Ninth Circuit recognized that the reciprocity requirement "has fallen into some disfavor." *Her Majesty*, 597 F.2d at 1164 n. 6.

territorial approach and does not defer to U.S. bankruptcy law.[41] This lack of reciprocity gives this Court pause. However, reciprocity is but one factor to weigh, *Remington*, 830 F.2d at 1273, and when weighed against the other factors, it does not win the day.[42]

3. Comity is Appropriate

After taking into account all the foregoing considerations, the Court concludes that granting comity is proper. Korea has significant interest in regulating business activity on its shores, *Overseas Inns*, 911 F.2d at 1149 (noting that U.S. courts consistently recognize foreign courts' interest in winding up the affairs of their domestic business entities), and any differences between Korean and U.S. bankruptcy law are minimal and do not offend U.S. notions of due process.[43] Moreover, DMA had notice, as well as a full and fair opportunity to participate in all facets of the Korean bankruptcy process. *Allstate*, 994 F.2d at 1000 (granting comity to Australian court because plaintiff had full notice, attended all meetings and hearings, were represented

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[41] CRA Article 4.2 provides: "Reorganization proceedings commenced in a foreign country shall not have any effect on property in the territory of the Republic of Korea." (Doc. 126, Ex. 33B).

[42] In this case, unlike *Remington*, a friendship treaty exists between Korea and the United States. *See Choi v. Kim*, 50 F.3d 244 (3d Cir. 1995) (acknowledging Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, 8 U.S.T. 2217, which "elevates a Korean judgment to the status of a sister state judgment."). While the existence of a Friendship Treaty is not dispositive, *id.* at 250 (holding, ultimately, that the Korean procedures executed pursuant to the Code of Civil Procedure did not comport with U.S. notions of due process) it certainly is a relevant consideration.

[43] DWMC was a substantial corporate citizen of Korea, employing thousands of people and involving numerous creditors.

on relevant committees, and filed two actions in the Australian courts). If DMA objected[44] to the relevant transactions[45] and orders, it should have done so before the Korean tribunal.[46] *International Trans.*, 347 F.3d at 594 (creditors of an insolvent foreign corporation may be required to assert their claims before a duly convened foreign bankruptcy tribunal to preserve claims against a foreign bankrupt); *In re Int'l Nutronics, Inc.*, 28 F.3d 965, 969 (9th Cir. 1994) (in res judicata context, a party is barred from seeking relief on grounds that could have been asserted in a prior suit between the same parties on the same cause of action). The fact that DMA now seeks to hold GMDAT liable as the successor of DWMC highlights DMA's true intention – to collaterally attack the entire Korean reorganization process and result. This Court will not permit such an improper collateral attack to undo the Korean Court's

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[44] There is evidence that DMA harbored grave concerns about a "potential breach" of the Distribution Agreement and knew of GM's potential decision to exclude DMA's U.S. operations from the GM-DWMC agreements. In fact, DMA management wrote to GM to express its concerns on March 27, 2002. (*See* Doc. 124, Ex. 21).

[45] It is worth noting that DMA ultimately stands to benefit from these transactions.

[46] Again, this Court's ruling mirrors Judge Bluebond's "Tentative Ruling:"

> If the debtor believed that the sale of a portion of the Korean parent's manufacturing facilities to GMDAT would result in a breach of an enforceable contract with the debtor, the debtor could and should have raised that issue at the time of sale in Korea . . . whether the debtor objected to the sale and had its objection overruled or whether the debtor could have objected to the sale and choose not to do so, the result should be the same. It is too late for the debtor to argue that the sale or transfer of these facilities violated its contract rights.

(Doc. 126, Ex. 36).

efforts regarding the MTA and Modified Reorganization Plan. Instead, the Court will grant comity to the Korean Court proceedings and orders and thereby help to preserve an orderly and systematic distribution of assets.

IV. Conclusion

For all the foregoing reasons, Defendants' Motions to Dismiss (Docs. 73 and 136) are **GRANTED**.

DONE and **ORDERED** in Chambers, Orlando, Florida this 26th day of August, 2004.

/s/ Gregory Presnell

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Party

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IN RE Daewoo Motor Co. Ltd.,
Dealership Litigation
MDL-1510
6:04-cv-201-Orl-31KRS

DAEWOO MOTOR AMERICA, INC.,
A Delaware corporation,

Plaintiff,

vs.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
SUZUKI MOTOR CORPORATION,
a Japanese corporation,
AMERICAN SUZUKI MOTOR CORPORATION,
a California corporation, and
GM DAEWOO AUTO TECHNOLOGY CO.,
a South Korean corporation

Defendants.

ORDER

Upon consideration of Plaintiff's Motion for Clarification/Reconsideration (Doc. 166) and Defendants' Responses thereto (Docs. 167 and 170); and after careful consideration of the briefs and additional documents filed by Plaintiff (Doc. 163), the Court sees no basis to reconsider its prior Order. To the Extent clarification is sought, it was this

Court's intent to dismiss all of Plaintiff's claims against Defendants based on the principle of comity. Accordingly, it is

ORDERED that Plaintiff's Motion is DENIED. The Clerk is directed to enter judgment for Defendants.

DONE and **ORDERED** in Chambers, Orlando, Florida this 7th day of October, 2004.

/s/ Gregory Presnell

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

APPENDIX D

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 03 2006
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15878-II

DAEWOO MOTOR AMERICA, INC.,

Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia [sic]*

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* The typographical error as to the district court from which this case is appealed appears in the Eleventh Circuit's original opinion. The appeal is actually from the United States District Court for the Middle District of Florida.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, PRYOR and ALARCÓN,* Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ William H. Pryor
UNITED STATES CIRCUIT JUDGE

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

No. 06-926

Supreme Court, U.S.
FILED
FEB 5 - 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,

Petitioner,

v.

GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION,
GM DAEWOO AUTO & TECHNOLOGY CO.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENTS SUZUKI MOTOR CORPORATION'S AND AMERICAN SUZUKI MOTOR CORPORATION'S BRIEF IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Suzuki Motor Corporation states that it is a corporation publicly traded in Japan.

Respondent American Suzuki Motor Corporation states that it is wholly owned by Suzuki Motor Corporation, which has no parent corporation.

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RESPONDENTS SUZUKI MOTOR CORPORATION'S AND AMERICAN SUZUKI MOTOR CORPORATION'S BRIEF IN OPPOSITION

Nothing in this case warrants this Court's intervention. The Eleventh Circuit ruled that Petitioner's claims amounted to a collateral attack on the judicially approved reorganization of Petitioner's Korean parent and that, on that basis, the district court had properly dismissed Petitioner's claims on grounds of international comity. However, it is important to note that the majority on the Eleventh Circuit panel also took care to review and reject Petitioner's Bankruptcy Code-based claims and its unjust enrichment claim *on the merits*. Moreover, the third judge on the panel, specially concurring in the dismissal of all of Petitioner's claims, wrote an extended opinion in which he demonstrated that, *regardless of comity issues*, none of Petitioner's claims were viable under applicable state law or the United States Bankruptcy Code.

The panel majority ruled that there had been no abuse of discretion in the district court's decision to extend comity to the final order of the Korean bankruptcy court – an order made at the conclusion of a major reorganization proceeding in which Petitioner had notice and an opportunity to be heard, was vigorously represented by Korean legal counsel, and received a monetary award on its claims. In so doing, the Eleventh Circuit neither created a circuit conflict nor impermissibly expanded the bounds of comity, as Petitioner now contends.

The Eleventh Circuit in this case applied an "abuse of discretion" standard of review, while noting that issues of law would be reviewed *de novo* since "an error of law constitutes an abuse of discretion." This standard of review derives from this Court's opinion in *Hilton v. Guyot,* 159 U.S. 113 (1895),

and is consistent with that used in recent cases in the Second, Third, Fifth, Ninth, Tenth and Federal Circuits.

Petitioner insists that the Eleventh Circuit created a conflict with the Second Circuit's articulation of the standard of review applicable to a district court's invocation of the doctrine of international comity in *Diorinou v. Mezitis*, 237 F.3d 133 (2d Cir. 2001). *Diorinou*, however, is equivocal about the proper standard of review and the Court ultimately deferred to the decision of the foreign (Greek) high court. Neither the Second nor any other circuit has adopted the *de novo* standard in subsequent opinions. In light of more recent, well-received, Second Circuit opinions applying an abuse of discretion standard, *Diorinou* simply does not pose a conflict on the issue.

Petitioner's secondary claim – that the Eleventh Circuit's decision conflicts with Third Circuit precedent on the appropriate scope of comity in the context of foreign bankruptcy proceedings – also fails. The Third Circuit did *not* hold, as Petitioner claims, that the application of comity principles in the international bankruptcy context is limited to claims against the foreign debtor. Instead, the Third Circuit, applying an abuse of discretion standard, only held that comity did not bar a lawsuit in the U.S. against a non-debtor transferee *when* the property in dispute was <u>*not*</u> included among the assets identified in the foreign bankruptcy court's order approving the sale of the debtor's property. *Remington Rand Corp. v. Bus. Systems Inc.*, 830 F. 2d 1260, 1266 (3d Cir. 1987).

Nor is the decision below called into question under *res judicata* principles. Not only was *res judicata* <u>not</u> the basis for the Eleventh Circuit's decision, the panel majority analyzed Petitioner's claims and determined that Petitioner could have raised those claims in the Korean bankruptcy proceeding and was thus precluded from asserting them in a subsequent, separate lawsuit. By claiming that the lower courts *incorrectly* determined that its claims could have been

raised in the foreign bankruptcy case in which it participated, Petitioner is really seeking to re-litigate that determination, essentially seeking mere error correction from this Court.

This case simply does not present an appropriate vehicle for certiorari. In light of its unusual facts and the paucity of cases addressing analogous circumstances, this case does not raise an important question of law with significant practical consequences.

Finally, the Eleventh Circuit's decision affirming dismissal on comity grounds was correct, and the concurring opinion included fully adequate, alternative grounds, based on state law and the Bankruptcy Code, for dismissal of all of Petitioner's claims, particularly those few that were asserted against Respondents Suzuki Motor Corporation and American Suzuki Motor Corporation ("the Suzuki Entities").

For these many reasons, therefore, the Petition should be denied.

STATEMENT OF THE CASE

Petitioner's recitation of the "facts" underlying this case is incomplete and misstates the factual record presented in the lower courts.[1] The alleged "destruction" of Petitioner Daewoo Motor America came about because its parent,[2] Daewoo Motor Co., Ltd. ("DWMC"), filed for bankruptcy in Korea and exited the car manufacturing business for reasons having nothing to do with the Respondents. The Eleventh

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[1] Although the case was disposed of on a motion to dismiss, as noted by Judge Tjoflat (Pet. App. at 29a, fn 11), it was not necessary for the district court to convert the motion into a Rule 56 motion for summary judgment because the additional documents and materials outside the scope of Petitioner's complaint were not disputed.

[2] Although Petitioner is now controlled by Creditors Management Association, DWMC was its parent from the date Petitioner was incorporated throughout the time of the events underlying this case.

Circuit's detailed and accurate examination of the facts bears highlighting.

Petitioner is a Delaware corporation and was a wholly owned subsidiary of DWMC, a South Korean automobile manufacturer. (Pet. App. at 2a) In 1999, Petitioner and DWMC entered into an Automobile Purchase and Distribution Agreement ("the Distribution Agreement"). (*Id.*) Under the Distribution Agreement, DWMC agreed to sell to Petitioner automobiles manufactured by DWMC and granted to Petitioner the exclusive right to distribute and sell those automobiles in the United States. (*Id.* at 2a-3a) The Suzuki Entities were not parties to the Distribution Agreement or any other agreement between Petitioner and its Korean parent corporation.

Less than a year after Petitioner and DWMC entered into the Distribution Agreement, DWMC filed for protection in Korea under the Korean Corporate Reorganization Act; thereafter, the Inchon District Court in South Korea appointed a Receiver. (*Id.* at 3a) DWMC notified Petitioner, as a creditor of DWMC, of its insolvency and its plans to file for court receivership. The notification included a summary of Korean bankruptcy law as well as warnings that creditors were required to participate in the reorganization plan to be repaid and that failure to file a claim would result in the loss of creditor rights. (*Id.*)

Petitioner retained the law firm of Jin & Lee in Korea to act on Petitioner's behalf in the Korean judicial proceedings.[3] (*Id.*) From January 15, 2001 through May 2002, Petitioner filed proofs of claims with the Korean court totaling over $79 million. (*Id.*) When most of those claims were rejected, Petitioner filed a complaint in the Korean court against the Receiver and DWMC challenging the Receiver's rejection

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[3] At a later stage of those proceedings, Petitioner also engaged the Korean law firm of Lee & Ko. (*Id.* at 67a, fn 39)

and seeking approval of all of its claims. (*Id.* at 4a) In May 2001, however, Petitioner dropped its suit. In 2002, Petitioner filed a supplemental claim for approximately $1.1 million, which the Receiver approved. (*Id.*)

Both before and during its reorganization proceedings, DWMC had negotiated with GM about the possibility of a sale of DWMC's operations. (*Id.*) In September 2001, DWMC and GM entered into a non-binding Memorandum of Understanding ("MOU") regarding the sale of certain of DWMC's assets. (*Id.* at 23a) The MOU contemplated that a new company would be formed to own and operate select assets and businesses of DWMC. (*Id.*) The Korean court approved the MOU. (*Id.* at 4a) The Suzuki Entities were *not* parties to the MOU and Petitioner does not allege that they ever made or adopted any representations with respect to the MOU or Petitioner's prospective status.

On April 30, 2002, DWMC and certain creditors negotiated and signed in Korea a Master Transaction Agreement ("the MTA") with GM in the Korean insolvency proceedings. (*Id.* at 5a) Under the MTA, "Newco A" (later known as GM Daewoo Auto & Technology Co. ["GMDAT"]) would acquire certain specified DWMC vehicle manufacturing assets, while other assets and liabilities, including certain existing distribution arrangements and, particularly, the Distribution Agreement, were to be excluded from the acquisition.[4] (*Id.*) The shares of Petitioner, which

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[4] Contrary to Petitioner's statement of facts, the MTA did *not* provide for the transfer of *all* of DWMC's assets. (*Compare* Pet. at 3 *with* Pet. App. at 5a, 24a, 54a-55a) For example, GMDAT was not acquiring the stock in certain distributors that was owned by DWMC. Nor did the MTA give "GM's designee the right to distribute identical vehicle models in petitioner's exclusive territory." (Pet. at 3) Similarly false is the statement that "[p]ursuant to the MTA, GM and ... respondent Suzuki Motor Corp. ... held a two-thirds ownership stake in GMDAT." (*Id.*) In fact, neither Suzuki nor American Suzuki was a party to the MTA.

were wholly owned by DWMC, were not among the assets to be acquired by GMDAT. (*Id.*)

On May 6, 2002, the Korean court held a creditor's meeting and approved a proposed reorganization plan for DWMC that did not reflect the terms of the MTA. (*Id.*) Petitioner, having received notice and attending the meeting through proxy, voted in favor of this original Reorganization Plan. (*Id.* at 2a, 53a) The Korean court approved the original plan, but requested that the Receiver file a modified plan that reflected the terms of the MTA. (*Id.* at 5a)

In April 2002, DWMC successfully sought permission from the Korean court for Petitioner to file its own bankruptcy proceeding in the United States. Accordingly, on May 16, 2002, Petitioner filed for bankruptcy in the Central District of California. (*Id.* at 6a) In August 2002, the California bankruptcy court granted a motion by the Official Committee of Unsecured Creditors of Petitioner to be appointed to prosecute claims against DWMC. (*Id.* at 6a, 54a) The creditors' committee received advice from Korean counsel regarding Petitioner's potential claims against DWMC related to the MTA. (*Id.* at 6a, 67a)

On September 12, 2002, DWMC filed with the Korean court a Modified Plan of Reorganization ("Modified Reorganization Plan"), which incorporated the terms of the MTA. (*Id.* at 6a) On September 17, 2002, Petitioner was sent notice of a September 30, 2002 creditors' meeting regarding a vote to be held on DWMC's Modified Reorganization Plan. (*Id.* at 7a, 54a, 66a-67a) On September 30, 2002, DWMC's creditors and the Korean court held the meeting to vote on the Modified Reorganization Plan. (*Id.* at 7a) Although Petitioner had notice of this meeting and could have attended or appointed another proxy to vote on Petitioner's behalf on the Modified Reorganization Plan, no representative of Petitioner attended the meeting or voted on the Modified Reorganization Plan. (*Id.*) The Korean court approved the Modified Reorganization Plan and the MTA that formed an

essential part of that plan on September 30, 2002 ("Plan Approval Order"). (*Id.*)

GMDAT was formed and it then acquired certain vehicle manufacturing assets from DWMC via an asset transfer agreement pursuant to the MTA. (*Id.*) Respondent Suzuki Motor Corporation currently owns a minority stake in GMDAT; Respondent American Suzuki Motor Corporation holds no interest in GMDAT.

In mid-2003, American Suzuki began to purchase vehicles manufactured by GMDAT for distribution in the U.S. (*Id.*)

Course of Proceedings and Disposition Below

On July 22, 2003, Petitioner filed this action against GM, GMDAT, Suzuki and American Suzuki as an adversary proceeding in the California bankruptcy court, alleging tort and Bankruptcy Code-based claims and seeking injunctive relief and damages. (*Id.*) At the outset, Petitioner sought a TRO against Respondents American Suzuki and GM, seeking to restrain them from importing any cars made by GMDAT. (*Id.* at 7a, 26a) Petitioner's request for injunctive relief was denied.

Petitioner filed an amended complaint on November 20, 2003, after motions to dismiss the original complaint had resulted in the dismissal of the claims for unjust enrichment and fraudulent transfer, without leave to amend, and the dismissal of various other claims, with leave to amend. A typical scattershot-style pleading, the amended complaint contained claims for fraud, tortious interference with contract, tortious interference with prospective economic advantage, aiding and abetting breach of fiduciary duty, violation of California's Cartwright Act, unfair competition, successor liability, unauthorized post-petition transfer, violation of the automatic stay, and several claims under Florida and Massachusetts statutes prohibiting wrongful termination of motor vehicle dealership agreements. Respondents moved to

dismiss the amended complaint on multiple grounds. (*Id.* at 8a)

The bankruptcy court dismissed the claims for violation of the Cartwright Act, unfair competition, and violation of the Massachusetts dealership statute without leave to amend; dismissed the claims under the Florida dealership statute with leave to amend; scheduled a later hearing on the motions concerning the claims of successor liability, unauthorized post-petition transfer, and violation of the automatic stay; and denied the motions as to the claims – asserted only against GM – of fraud, tortious interference with contract, tortious interference with prospective economic advantage, and aiding and abetting breach of fiduciary duty. (*Id.*)

In February 2004, the Judicial Panel on Multidistrict Litigation transferred the action to the District Court for the Middle District of Florida for consolidation with *In re Daewoo Motor Co., Ltd., Dealership Litigation*, MDL Docket No. 1510. (*Id.*) On August 26, 2004, after supplemental briefing and a hearing, the district court dismissed the remaining claims of the amended complaint with prejudice on the ground of international comity. (*Id.* at 49a-71a) Finding that "Korea has significant interest in regulating business activity on its shores," that Korean bankruptcy laws are consistent with U.S. notions of due process, that Petitioner "had notice, as well as a full and fair opportunity to participate in all facets of the Korean bankruptcy process," and could and should have raised its objections to the MTA and the sale of certain DWMC assets in the Korean bankruptcy proceedings, the district court concluded that Petitioner's claims constituted a collateral attack on the Korean bankruptcy court's order approving DWMC's Modified Reorganization Plan and the MTA. (*Id.* at 9a)

The district court also ruled that the Modified Reorganization Plan and the MTA approved by the Korean court did not violate the automatic stay in effect in Petitioner's own U.S. bankruptcy proceedings because the

Distribution Agreement with its parent, DWMC, did not give Petitioner property rights in vehicles manufactured by GMDAT. (*Id.*) Thus, Petitioner's claims for violation of the automatic stay and unauthorized post-petition transfer lacked merit, without regard to issues of comity.

The Eleventh Circuit affirmed the district court's decision. First, the panel majority determined that "the district court correctly concluded that the order of the Korean court approving the Modified Reorganization Plan of [DWMC] did not affect any property interest of [Petitioner] and did not violate the automatic stay [in Petitioner's U.S. bankruptcy]". (*Id.* at 13a) Petitioner does not challenge this finding.

Second, the panel majority ruled that the district court did not abuse its discretion in granting comity to the Korean bankruptcy court's Plan Approval Order, or err in determining that Petitioner's objections to the Modified Reorganization Plan and the MTA could have been raised in the Korean bankruptcy proceeding. Specifically, the panel majority found:

- That Petitioner's present claims are based on the Modified Reorganization Plan and the MTA, which were approved by the Korean court.
- That the validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court.
- That Petitioner's complaint regarding the effect of the MTA could and should have been raised before the Korean court.

(*Id.* at 16a) Based on these findings, the panel majority agreed with the district court that Petitioner's claims all rely entirely on the alleged invalidity of the transactions approved

by the Korean court.[5] (*Id.*) Citing *Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972), for the proposition that "[e]ven though an action has an independent purpose and contemplates some other relief, it is a collateral attack if it must in some fashion overrule a previous judgment," the panel majority concluded that, "[b]ecause granting the relief sought would require the court to set aside the asset transfer to the defendants, which was approved by the Korean court, the complaint is a collateral attack on the order of the Korean court." (*Id.* at 16a-17a) Hence, the panel majority held that it was not an abuse of discretion for the district court to preclude such a collateral attack. (*Id.*) Petitioner challenges this conclusion in its petition to this Court.

In a separate opinion, Judge Tjoflat concurred in the panel majority's judgment.[6] (*Id.* at 19a) In Judge Tjoflat's view, four of Petitioner's claims directly attacked the validity of the Korean bankruptcy court's Plan Approval Order by alleging that the judicially approved asset transfer itself was the wrongful conduct. (*Id.* at 37a-38a) "Thus, [Petitioner] cannot attack the MTA without also attacking the [Korean] bankruptcy court's approval of it; the two are inextricably intertwined." (*Id.* at 38a) For that reason, Judge Tjoflat agreed with the panel majority "that [these claims] amount to nothing more than a collateral attack on the Korean

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[5] Contrary to Petitioner's characterization, the panel majority did not "assume" that all of Petitioner's claims could have been raised in the Korean proceeding. The issue was the subject of extensive document discovery and depositions in the California bankruptcy court proceedings, and was fully briefed, both in the district court and the Eleventh Circuit. (*See* Pet. at 7-8, fn 3, Pet. App. at 52a, fn 9, 54a, fns 14-16, 59a, fn 25, 66a, fn 36, and 67a, fns 38-39; *see also*, p. 3, fn 1, *supra*.)

[6] Although he recognized that the California bankruptcy court had already dismissed with prejudice several of Petitioner's claims due to their lack of legal merit, Judge Tjoflat reviewed the Florida district court's ruling as if it had dismissed all of the claims in Petitioner's amended complaint on comity grounds, and thus he considered each of Petitioner's claims on appeal.

bankruptcy court's order" and were therefore properly dismissed on grounds of international comity. (*Id.*) Judge Tjoflat determined that the remainder of Petitioner's claims were legally insufficient under the Bankruptcy Code and on state law grounds – primarily, that those claims relied on an erroneous and insupportable interpretation of the Distribution Agreement between Petitioner and DWMC.[7]

Petitioner petitioned the Eleventh Circuit for rehearing. That petition was denied. (*Id.* at 74a-75a)

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Decision Creates No Conflict Among The Circuits Over The Applicable Standard Of Review In International Comity Cases.

Petitioner's assertion that there is conflict between the circuits and confusion in lower courts on the standard of review in international comity cases ignores the one hundred-plus years of jurisprudence applying the clear instruction on international comity that this Court laid out in *Hilton v. Guyot*, 159 U.S. 113 (1895). As the Court stated there:

> "'Comity,' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

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[7] "[T]he Distribution Agreement contains no guarantee that [Petitioner] would continue to receive Products after [DWMC] ceased manufacturing them, nor does the agreement restrict [DWMC's] ability to sell its manufacturing assets. ... To the extent [Petitioner's] claims rely on the existence of such guarantees, they must fail." (*Id.* at 45a)

Id. at 163-64. Since *Hilton*, the application of comity has been deemed a discretionary decision that deference to the act of a foreign government (or its courts) will best promote the mutual interests of the United States and the foreign sovereign.

The Eleventh Circuit in this case applied an "abuse of discretion" standard of review, but noted, "We review...questions of law *de novo*. 'An error of law constitutes an abuse of discretion.' The interpretation of a contract is a question of law that the court reviews *de novo*." (Pet. App. at 10a; citations omitted.)[8]

This ruling is entirely consistent with controlling decisions of the Second, Third, Fifth, Ninth, Tenth and Federal Circuits. *See, Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A. de C.V.*, 347 F.3d 589, 593 (5th Cir. 2003) (In reviewing the district court's grant of comity to a Mexican bankruptcy court's order with respect to an assignment of an arbitration award, the Fifth Circuit stated, "The court's decision to grant comity to the Mexican bankruptcy court's ruling is reviewed for abuse of discretion."); *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1087 fn 18 (9th Cir. 2006) ("We join our sister circuits in clarifying that this abuse of discretion review applies to dismissals on grounds of international comity ...." [citing *JP Morgan*

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[8] Petitioner implies that the standard of review was a hotly disputed issue below. In fact, the Eleventh Circuit's brief discussion of the standard of review occupied but three short paragraphs. (Pet. App. at 9a-10a) Moreover, Petitioner's treatment of the standard of review below was equally brief and was essentially based on a claim that various aspects of the review, such as the interpretation of the Distribution Agreement and issues of California state law on contract interpretation, should be *de novo* (Petitioner's Brief below at pp. 20-21), a proposition with which the Eleventh Circuit *agreed*. Indeed, Petitioner noted, "The result is the same even under an abuse of discretion standard, however, because the district court's ruling rested on multiple errors of law." (Petitioner's Brief below at p. 22, fn 12.)

Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 422 (2d Cir. 2005), discussed *infra*, at p. 13]); *Int'l Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001) ("The district court's extension of international comity is reviewed for abuse of discretion."); *Remington Rand Corp. v. Bus. Systems Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987) ("Because the extension or denial of comity is discretionary, we review this issue by the abuse of discretion standard."); and *In re Colorado Corp.*, 531 F.2d 463, 469 (10th Cir. 1976) ("[W]e believe it was an abuse of discretion not to grant comity to the orders of the foreign courts.").

Petitioner relies on a lone Second Circuit opinion, *Diorinou v. Mezitis*, 237 F.3d 133 (2d Cir. 2001), to try to create an illusion of a circuit conflict. In fact, however, there is no conflict. Indeed, the Second Circuit has articulated an abuse of discretion standard for reviewing district court decisions based on international comity in a number of other, more recent cases.

The Second Circuit's recent discussion of the doctrine of international comity in *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 422-23 (2d Cir. 2005) is illustrative. Without mentioning *Diorinou*, the Second Circuit asserted a traditional abuse of discretion standard for reviewing a district court's decision to abstain on international comity grounds:

> "Declining to decide a question of law on the basis of international comity is a form of abstention, and ***we review a district court's decision to abstain on international comity grounds for abuse of discretion***. *See, e.g., Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999); *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993). We recognize that in ***other*** abstention cases involving the 'act of state'

> doctrine and some forms of domestic federal-state abstention, we apply a 'somewhat more rigorous' standard of review than abuse of discretion that approaches *de novo* review. ... ***Because our international comity abstention cases rely on the abuse of discretion standard, we apply that standard in this case.***"

Id. at 422-23 (citations omitted; emphasis added).[9]

Diorinou itself was a very complex and contentious case involving conflicting and contemporaneous child custody awards obtained in parallel proceedings brought under New York law, Greek law and the Hague Convention on Civil Aspects of International Child Abduction, which were litigated through the state and federal courts of New York and various courts of first instance and appeal in Greece.

The district court granted comity to what it found to be the determination of the highest court of Greece in the Hague

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[9] The abuse of discretion standard articulated in *JP Morgan* is not surprising in light of numerous recent Second Circuit decisions addressing the application of international comity and the appropriate standard of review. *See, Finanz AG Zurich v. Banco Economico, S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) ("We review a district court's decision to extend or deny comity to a foreign proceeding for abuse of discretion."); *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998) ("The District Court's dismissal on the ground of international comity is reviewed for abuse of discretion."); *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 856 (2d Cir. 1997) (denial of motion to stay U.S. proceedings in deference to pending foreign proceeding on international comity grounds is "reviewed only for abuse of discretion"); *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993), *cert denied*, 510 U.S. 945 (1993) ("[S]ince the extension or denial of comity is within the court's discretion, we will reverse the court's decision only when we find an abuse of discretion."; extending international comity in cases involving foreign bankruptcy proceedings is "particularly appropriate"); *Cunard S.S. Co. v. Saleen Reefer Servs.*, 773 F.2d 452, 460 (2d Cir. 1985) (district court did not abuse its discretion in vacating attachment in the U.S. and granting comity to pending Swedish bankruptcy proceedings).

petition litigation that the wife (Diorinou) had not wrongfully retained the children in Greece. Ultimately, the Second Circuit resolved the case "by deferring to the decisions of the Greek courts on the Greek Hague petition". 237 F.3d at 146.

It was in that context that the Second Circuit discussed the appropriate standard of review of a district court's decision to grant comity to a foreign court's judgment. Far from being explicit about a uniform answer to the question, Judge Newman acknowledged that there were various circumstances in which the issue of international comity arises and that the precise interface between *de novo* review of issues of law and discretionary review of the grant of comity was uncertain. Judge Newman noted that the abuse of discretion standard was applied to those situations in which there was pending litigation in a foreign forum because that was akin to a *forum non conveniens* analysis. *Id.* at 139. He then opined that the standard of review applicable to enforcement of a foreign judgment was "not clearly articulated" and that when the issue was one of adjudication of a particular issue, "appellate courts have not explicitly articulated the standard of review". *Id.* at 139-40. He concluded that he "believed" that in the latter two cases the standard was *de novo* review. Having reached that tentative conclusion, Judge Newman then examined the legal issues with respect to the varying determinations in the New York and Greek courts and ultimately deferred to the Greek decisions.

To the extent that *Diorinou* can be read as holding that the standard of review applicable to the grant of international comity is, in some cases, *de novo*, it is far from a seminal case. In fact, *Diorinou* has been followed only by one Texas state appellate court on the issue of the standard of review for decisions based on comity.[10] Moreover, as authority for

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[10] *See Velez v. Mitsak*, 89 S.W.3d 73, 2002 Tex. App. LEXIS 6251 (Tex. App. El Paso 2002). It is important to note that, like *Diorinou*, *Velez* involved a child custody dispute under the Hague Convention on Civil Aspects of International Child Abduction, and the Texas appellate

general proclamations concerning the application of international comity, *Diorinou* has been largely ignored since its publication in 2001.[11]

In sum, the *Diorinou* decision cannot be read nearly as broadly or absolutely as Petitioner would read it, and it is far from "beyond dispute that, had this appeal been heard by the Second Circuit, the court of appeals would have applied a *de novo* standard of review."[12] (Pet. at 17) On the contrary,

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court reviewed *de novo* a trial court's application of full faith and credit to a foreign ruling on a Hague Convention petition. *Id.* at 81-82. Furthermore, the court in *Velez* applied the *de novo* standard of review with reservations, noting that the court in *Diorinou* had "concluded that ... the standard of review had not been explicitly articulated." *Id.* at 79.

[11] Aside from the Texas state appellate court opinion, only six opinions (of which three are unpublished) have referenced the *Diorinou* case in the context of comity, and *none* have mentioned its discussion of the standard of review for decisions based on comity: *ICC Chem. Corp. v. TCL Indus. (Malaysia) SDN*, 2006 U.S. App. LEXIS 29083, *4 (2d Cir. 2006) (citing *Diorinou* to explain the principles and considerations in extending comity to a foreign court's adjudication); *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 93 (2d Cir. 2005) (citing *Diorinou* for standard of review of a decision applying state law collateral estoppel and *res judicata* principles); *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004) (citing *Diorinou*'s *dicta* that United States courts "may choose to give *res judicata* effect to foreign judgments on the basis of comity", but "are not obliged" to do so); *I.G. Farben S'holders Organization v. UBS AG*, 2006 U.S. Dist. LEXIS 63347, *15 (E.D.N.Y. 2006) (citing *Diorinou* for the proposition that, "[u]nder well established Second Circuit case law, 'American courts will normally accord considerable deference to foreign adjudications as a matter of comity.'"); *Films by Jove, Inc. v. Berov*, 341 F. Supp. 2d 199, 213 (E.D.N.Y. 2004) (citing *Diorinou* as an example of "established law that comity is not applied in contravention of public policy principles"); *Mackley v. Sullivan & Liapakis, P.C.*, 2001 U.S. Dist. LEXIS 21723, *20 (S.D.N.Y. 2001) (citing *Diorinou* for the principle that "[a] dismissal on grounds of *forum non conveniens* is reviewed for abuse of discretion").

[12] *Hachamovitch v. Debuono*, 159 F.3d 687 (2d Cir. 1998), cited by Petitioner for a "more rigorous" abuse of discretion standard in abstention cases (Pet. at 17, fn 5), did not involve the considerations of international

given the great weight of authority in the Second Circuit, including its recent opinion in *JP Morgan, supra,* specifically addressing the appropriate standard of review in the context of international comity, there is no indication that the Second Circuit would have reviewed this case under a different standard than did the Eleventh Circuit.

Finally, there is no indication that *de novo* review would have led to a different result. Asserting only that the Eleventh Circuit should have utilized the *Diorinou* court's framework, Petitioner identifies nothing that the panel majority should have done additionally or differently under a *de novo* analysis of the extension of comity to the Korean bankruptcy court's

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comity articulated in *Hilton*. Instead, the Second Circuit was called on to review a district court's application of the Rooker-Feldman and Burford doctrines to a dispute between a physician and New York's licensing board. Its holding appears to be limited to the Burford doctrine. *Id.* at 693 ("we review a district court's decision to abstain on Burford grounds for abuse of discretion").

Nor does the Second Circuit's decision in *Royal and Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88 (2d Cir. 2006) present a circuit conflict. The case did not involve a foreign bankruptcy proceeding, which the court there admitted would require particular deference: "A foreign nation's interest in the 'equitable and orderly distribution of a debtor's property' is an interest deserving of particular respect and deference, and accordingly we have followed the general practice of American courts and regularly deferred to such actions." *Id.* at 92-93. Indeed, the *Royal and Sun Alliance* court adopted its "more rigorous" abuse of discretion standard of review from *Hachamovitch*, which similarly involved neither bankruptcy nor a foreign proceeding. *Id.* at 92.

Moreover, the Second Circuit clearly contemplated a distinction between a "more rigorous" abuse of discretion standard for review of a decision to abstain and *de novo* review, which it reserved for a district court's conclusions of law. *Id.* at 92. Whatever the difference between abuse of discretion and its "more rigorous" form, a form which has not been adopted by any other court, it is not a *de novo* standard. The standard of review applied by the Eleventh Circuit panel majority is therefore consistent with both *Hachamovitch* and *Royal and Sun Alliance.*

Plan Approval Order or how such an alternative analysis would have produced a different result. (*Id.* at 21) Indeed, given Judge Tjoflat's detailed analysis concurring in the dismissal of all of Petitioner's claims on state law and Bankruptcy Code grounds, having agreed in part with the majority's comity analysis as to certain claims, Petitioner cannot hope to obtain a different result from the court below, even if a *de novo* standard were to be applied.

II. The Eleventh Circuit's Comity Analysis Does Not Conflict With The Decision In *Remington Rand* Or Principles of *Res Judicata.*

Under the guise of a conflict with the Third Circuit's decision in *Remington Rand Corp. v. Bus. Systems Inc.*, 830 F.2d 1260 (3d Cir. 1987), Petitioner claims that the Eleventh Circuit impermissibly expanded the application of the doctrine of international comity beyond judicially prescribed bounds.[13] In touting *Remington Rand* as delimiting the boundaries of international comity, Petitioner essentially seeks to have this Court confine the application of comity in United States courts to disputes involving the identical parties and claims as were directly involved in the foreign proceeding, per the requirements of *res judicata*. However, neither this Court nor any circuit court has limited the doctrine of international comity to the strictures of *res judicata*. Indeed, Petitioner's requested limitation is at odds with the oft-stated goal in transnational insolvencies of providing an orderly and systematic distribution of the debtor's estate.

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[13] Relative to the preceding discussion of Petitioner's primary point regarding the proper standard of review in international comity cases, it is to be noted that the Third Circuit, in *Remington Rand*, applied the abuse of discretion standard in reviewing the district court's decision on comity. *Id.* at 1266 ("Because the extension or denial of comity is discretionary, we review this issue by the abuse of discretion standard.").

Furthermore, by claiming a conflict with the "basic principle[] of *res judicata*" that a prior proceeding will not bar claims that could not have been brought there, Petitioner requests that this Court overturn the lower courts' determinations that Petitioner *could* have asserted its claims in the Korean bankruptcy proceeding of its Korean parent corporation. Such error correction affords no basis for review by this Court.

A. The panel majority's decision is consistent with the fundamental goal in transnational insolvencies. Petitioner's argument that "the fundamental purpose of bankruptcy laws is to protect the *debtor* and its property – not to protect third parties who are not the debtors in the bankruptcy proceeding" (Pet. at 22; emphasis in original) is a convenient, albeit misleadingly facile, spin on bankruptcy law of no consequence here. Federal courts discussing claims arising in transnational insolvencies agree that the overarching goal is to "enable the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion". *Cunard S.S. Co. v. Saleen Reefer Servs.*, 773 F.2d 452, 457-58 (2d Cir. 1985); *see also Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A. de C.V., supra,* 347 F.3d at 594; *Finanz AG Zurich v. Banco Economico S.A., supra,* 192 F.3d at 246; *Allstate Life Ins. Co. v. Linter Group Ltd., supra,* 994 F.2d at 999; *Remington Rand v. Bus. Systems Inc., supra,* 830 F.2d at 1267; *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987) ("The equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail."); *Cornfeld v. Investors Overseas Services, Ltd.*, 471 F. Supp. 1255, 1259-60 (S.D.N.Y. 1979), aff'd, 614 F.2d 1286 (2d Cir. 1979).

This goal is well served by applying comity to bar creditor claims against a non-debtor arising from its dealings

with the debtor's assets under a judicially approved plan of sale or reorganization. *See In re Met-L-Wood Corp.*, 861 F.2d 1012, 1018 (7th Cir. 1988) (suit against purchaser of debtor's assets and others involved in bankruptcy sale was a collateral attack on the judgment approving the sale in contravention of the goal of finality in judicial sales in bankruptcy; "the validity of the sale was established, even against non-parties to the sale proceeding"); *In re All Am. of Ashburn, Inc.*, 56 B.R. 186, 190 (N.D. Ga. 1986) (orders approving sales of debtor assets are free and clear and not subject to collateral attack by creditor who does not receive formal notice but has actual notice of the sale and chooses not to file claim).[14]

Against this background, Petitioner's claims seeking to *enjoin* Respondent American Suzuki from taking possession of and distributing vehicles manufactured by GMDAT constitute an obvious challenge to the Korean bankruptcy court's orderly and systematic disposition of DWMC's manufacturing assets.[15] Only slightly less obvious is the

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[14] This Court itself has suggested that a bankruptcy proceeding should culminate in a certain and final plan of distribution or reorganization, applicable to third parties as well as participants in the insolvency proceedings. In *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883), United States bondholders of a Canadian railroad company were held to be subject to a reorganization plan approved in Canada and precluded from initiating action in the U.S. against the Canadian debtor despite neither assenting to the Canadian debtor's reorganization plan nor subjecting themselves to the jurisdiction of any Canadian court with respect to the Canadian debtor's bankruptcy. *Id.* at 539 ("*Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail.* All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."; emphasis added).

[15] Tellingly, Petitioner implicitly admits, by omission of several of its claims from its footnote 11, that certain claims in its First Amended Complaint – the breach of fiduciary duty, California Cartwright Act, unfair competition, unauthorized post-petition transfer, and violation of

challenge that Petitioner's *damages* claims present to the orderly and systematic disposition of the Korean debtor's bankruptcy estate. Although such claims do not literally seek to overturn the court-approved sale of DWMC's assets to GMDAT, the claims certainly impair the unfettered rights the transferee expected to obtain from the judicially approved sale. Quite obviously, the prospect of future creditor lawsuits against third parties who participate in a bankruptcy court-approved sale of the debtor's assets would severely impair a trustee's ability to sell those assets (for the benefit of the debtor, all creditors and other stakeholders) or otherwise carry out corporate reorganization activities.

The equitable, orderly and systematic disposition of a debtor's assets is not promoted by permitting creditors to spring upon a non-debtor whose dealings with the debtor's estate were supervised and expressly approved by a foreign bankruptcy court having jurisdiction over the debtor's estate. The Eleventh Circuit's ruling is entirely consonant with the fundamental goal of promoting orderly administration, certainty and finality in transnational bankruptcy proceedings.

B. The panel majority's decision does not conflict with the Third Circuit's application of comity in *Remington Rand*. Contrary to Petitioner's bald assertion, the Third Circuit did not hold in *Remington Rand* that, as a matter of law, non-debtors are *always* precluded from relying on comity principles as a shield against the claims of third parties. Nor did the *Remington Rand* court hold – as Petitioner suggests – that comity principles are "designed to protect the foreign debtor". (Pet. at 25)

In *Remington Rand*, the Third Circuit was presented with a U.S. parent's (Remington U.S.) assertion of trade secret

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automatic stay claims – <u>do</u> in fact seek the invalidation of GMDAT's judicially approved acquisition of specific DWMC assets. *See* Pet. at 28, fn 11.

misappropriation claims against a Dutch purchaser (BSI B.V.) of assets from the parent's insolvent Dutch subsidiary (Remington B.V.). BSI B.V.'s purchase of enumerated assets of Remington B.V. was approved and ordered by the Dutch bankruptcy court. However, neither intellectual property generally nor the trade secrets in particular were mentioned in the enumeration. *Id.* at 1266. BSI B.V. claimed that comity should have been afforded to the Dutch bankruptcy court's order approving the sale of assets to BSI B.V. The Third Circuit affirmed the district court's refusal to invoke comity to bar the suit by Remington U.S. because, *inter alia*, the sale of the confidential know-how in the hands of Remington B.V. (under license from Remington U.S.) was *not* covered by the terms of the Dutch court's sale order. Moreover, Remington U.S. had *not* been provided notice or an opportunity to be heard on the eventual terms of the sale and thus was *not* afforded due process before the Dutch tribunal. *Remington Rand*, 830 F.2d at 1266.

Remington Rand is thus factually distinct from the matter reviewed by the Eleventh Circuit. The Third Circuit did not have to address whether the claims made by Remington U.S. would disrupt a properly approved and valid sale of its foreign subsidiary's assets; instead, the court held that the transfer of the know-how, taking place on terms that exceeded the Dutch court's approval order, was invalid and unenforceable as against Remington U.S. for want of due process. Hence, it is not surprising that the Third Circuit declined to recognize the unauthorized transfer in the Netherlands as a bar to Remington U.S.'s misappropriation claims against the non-debtor transferee. However, the *Remington Rand* court recognized that comity could be applied in appropriate cases to bar claims against a non-debtor party dealing with the debtor's estate and its property: "The rationale for granting comity in such a situation would be to allow a foreign debtor's assets to be distributed equitably. ... In the foreign bankruptcy context, comity is

based on the additional rationales that the foreign debtor's assets will be distributed in an equitable fashion, ... and that one who conducts his affairs with foreign corporations subjects himself to foreign bankruptcy laws." *Remington Rand*, 830 F.2d at 1267-68 (citations omitted).

Here, in contrast to the creditor-plaintiff (Remington U.S.) in *Remington Rand*, Petitioner concedes that it received notice and had an opportunity to challenge the Modified Reorganization Plan and the MTA before the Korean bankruptcy court and that the sale of DWMC's assets was consistent with the plan approved by the Korean court. Petitioner has never claimed that the MTA exceeded the scope of the Korean court's Plan Approval Order, nor was Petitioner denied its due process right to be heard on the effect of the proposed transaction between DWMC, GM and GMDAT. Rather, Petitioner is asserting claims against GMDAT, the purchaser of DWMC's manufacturing assets, and those who later purchased cars manufactured by GMDAT through the use of those assets, simply because Petitioner was excluded from the MTA. In short, Petitioner is objecting solely to the fact that the sale took place exactly as contemplated by the MTA and as approved by the Korean bankruptcy court. Thus, the Third Circuit's reasoning in *Remington Rand* is inapposite here,[16] and its denial of comity to bar a claim against a non-debtor in one particular scenario does not present a conflict with the Eleventh Circuit's grant of comity to the Korean court's order in this case.[17]

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[16] Furthermore, this case, unlike *Remington Rand*, implicates a friendship treaty between Korea and the United States, further underscoring the propriety of the Eleventh Circuit's comity decision. *See* Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, 8 U.S.T. 2217.

[17] Petitioner's further reliance on *BDL International v. Sodetal USA*, 377 F. Supp. 2d 518 (D. S.C. 2005) is misplaced. *BDL* concerned a U.S. consignee's liability to its customs broker/inland shipper, where the district court rejected the consignee's attempt to bar the case in favor of

C. The Eleventh Circuit's determination that Petitioner's claims could and should have been adjudicated in the Korean bankruptcy proceeding does not conflict with principles of issue preclusion, specifically, that a ruling in a prior proceeding cannot bar claims that could not have been raised in a prior litigation. Petitioner misleadingly states that the panel majority ruled that "an order of a foreign court approving a plan of reorganization for a foreign debtor bar[s] not only claims against the foreign debtor but also claims against *parties other than the debtor that could not have been adjudicated* by the foreign bankruptcy court". (Pet. at 12; emphasis in original)

First, the Eleventh Circuit did not rule as to "claims against the foreign debtor" for the simple reason that Petitioner did not assert claims against the foreign debtor, DWMC, in this case; Petitioner directed its claims only against the Respondents as beneficiaries, to varying degrees, of the sale of DWMC's assets under the MTA.

But, more importantly, the Eleventh Circuit's ruling was not a preclusion of claims that "could not have been raised" in the Korean bankruptcy court. (*Id.* at 12, 14) The panel majority expressly found that Petitioner's claims were in fact capable of adjudication in the Korean bankruptcy proceeding because, although dressed up as claims against third parties, the claims amounted to an objection to the MTA and the

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the pending bankruptcy of a French exporter who contracted with the broker/shipper. *BDL*, 377 F. Supp. 2d at 526 (holding that consignee's direct liability to broker/shipper under shipping contract was not an issue for the French bankruptcy court). Moreover, *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico*, 1995 U.S. Dist. LEXIS 15629, at *8 (E.D. Pa. Oct. 25, 1995), is inapposite, as it involved a plaintiff's declaratory relief action for determination of its trademark ownership under its license to a Mexican debtor. That case did not concern a creditor's claim against a third party purchaser of assets under a foreign bankruptcy judgment.

Modified Reorganization Plan.[18] Reading between the lines, Petitioner's issue is not whether a court is precluded as a matter of law from applying comity to bar claims that *could not* have been raised in a prior proceeding; Petitioner's contention is that the panel majority wrongly found that Petitioner's claims *could and should have been raised in the Korean bankruptcy proceeding*. Far from seeking a review of a circuit "conflict," Petitioner seeks correction of an adverse legal determination by the lower courts, namely, that all of Petitioner's claims arose from the terms of the Modified

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[18] Whether Petitioner's claims could have been asserted in the Korean proceeding was litigated in the lower courts, and was expressly determined by the Eleventh Circuit:

> "[Petitioner] next argues that the scope of the comity granted to the order of the Korean court should not extend to its claims against the [Respondents] because those claims were not and could not have been raised in the Korean bankruptcy proceeding. [Petitioner] argues that ... [its claims] were not necessarily put at issue by the Korean proceedings. These arguments fail."

(Pet. App. at 16a)

> "[T]he facts underpinning [Petitioner's] complaint ... were at issue in the Korean proceeding because those facts relate to the approval of the Modified Reorganization Plan and the MTA. The claims of [Petitioner] rely entirely on the alleged invalidity of the transactions approved by the Korean court."

(*Id.* at 17a) In his concurring opinion, Judge Tjoflat also agreed that at least four of Petitioner's claims "by their nature, call the Korean bankruptcy court's orders and proceedings into question" because they "point to the asset transfer itself as the illicit conduct" and "amount to nothing more than a collateral attack on the Korean bankruptcy court's orders." (*Id.* at 37a-38a) Moreover, he agreed that "international comity is an appropriate basis for disposing of these four claims. ... Such a collateral attack should not be entertained, and the district court's abstaining from deciding the merits of these claims in no measure constituted an abuse of discretion." (*Id.* at 38a)

Reorganization Plan approved by the Korean court and could have been raised in the Korean bankruptcy court.

That Petitioner seeks error correction – instead of resolution of conflicting legal standards or answers to important statutory or constitutional questions – from this Court is most evident in the petition's lengthy footnote 4. Noting that Judge Tjoflat, on whose specially concurring opinion Petitioner otherwise so strongly relies, provided alternative state law and Bankruptcy Code-based grounds for dismissal of all of Petitioner's claims, Petitioner speculates that it could convince the panel to reach an entirely different conclusion regarding the viability of Petitioner's claims if given yet another bite at the apple. Petitioner would have this Court remand this case, not to iron out a circuit split, but rather so that Petitioner can try to persuade the Eleventh Circuit that its claims did not arise out of the terms of the Modified Reorganization Plan approved by the Korean bankruptcy court and could not have been heard by that court; should Petitioner be successful on those points, it then hopes to convince the judges that its claims are meritorious under various state law and Bankruptcy Code principles. That Petitioner hopes to obtain a different result, after the district court's original determination, an unsuccessful motion for reconsideration, the Eleventh Circuit's opinion and an unsuccessful petition for rehearing *en banc*, does not present a suitable basis for review by this Court.[19]

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[19] It is most unlikely that Petitioner would be able to persuade the Eleventh Circuit on remand that its claims do not all arise from the Korean bankruptcy court's order approving the transfer of DWMC's manufacturing assets. Indeed, Petitioner *admits* that its claims either "address the validity of the acquisition itself" or are "based on respondents' conduct in terminating petitioner's vehicle supply, the related collateral effects of that termination, and respondents' use of the assets acquired from DWMC." (Pet. at 28-29) Far from indicating that Petitioner's claims would be viewed in a different light on remand, such characterizations confirm that the lower courts correctly held that Petitioner's claims arose from the Korean court's order approving

The panel majority's determination that Petitioner *could* have brought its claims in the Korean proceeding also eliminates any supposed conflict with *Marrese v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S. 373 (1985), the holding of which Petitioner misstates. In *Marrese*, this Court reversed a Court of Appeals determination that the "full faith and credit" statute, 28 U.S.C. § 1738, permitted preclusion of a federal antitrust claim because of a prior Illinois state court judgment rendered on the same underlying events. In reaching that result, the appellate court failed to evaluate the preclusive effect that Illinois law would confer upon its own state court judgment. This Court reversed and remanded the case for a determination of "the content of Illinois preclusion law". *Id.* at 386-87. Although the Court noted that a federal antitrust claim is not within the jurisdiction of the state courts and thus such a federal antitrust claim would most likely *not* be barred by Illinois law on claim preclusion by virtue of the earlier state court judgment against the plaintiff, that observation and the *Marrese* case have no application here. Here, based on the factual record developed in the California bankruptcy court, both the district court and the Eleventh Circuit determined that Petitioner's claims *were* capable of adjudication by the Korean court and therefore could be barred under a grant of comity to the Korean court's order. Such a determination does not offend this Court's holding in *Marrese* or the principles of *res judicata*.[20]

GMDAT's acquisition of certain assets as part of DWMC's court-supervised and approved reorganization.

[20] Similarly, cases cited by Petitioner which discuss a prior court's lack of jurisdiction over the subject of a subsequently brought claim are inapposite. (*See*, Pet. at 28-29, fn 10, citing *Brody v. Village of Port Chester*, 345 F.3d 103 (2d Cir 2003); *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996); *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318 (9th Cir. 1992); *In re Birting Fisheries, Inc.*, 300 B.R. 489 (B.A.P. 9th Cir. 2003))

In the absence of any circuit conflict, or conflict with well established principles of international comity or *res judicata*, there is no reason to second-guess the lower court rulings. Review of Petitioner's second question should be denied.

III. The Case Presents Questions Of Limited Importance And Practical Utility.

A. This is not a case in which the Court is called upon to address issues of wide-ranging international importance. Perhaps appreciating the absence of any conflict with Second or Third Circuit precedent, Petitioner devotes substantial attention to an argument that the case poses an important question of federal law that warrants this Court's attention. Yet even cursory scrutiny of the reasons advanced by Petitioner reveals this argument to be without merit.

Petitioner's effort to instill this case with greater importance by invoking "the exponential growth of multinational or transnational corporate enterprise" (Pet. at 11) and raising the specter of "the Nation's relations with other countries" (*id.*) should be disregarded for the empty rhetoric it is. Far from being an "important and recurring phenomenon" (*id.* at 12), litigation regarding the application of comity to foreign bankruptcy proceedings, let alone "consecutive foreign and domestic bankruptcy proceedings" (*id.* at 11), is rare. The infrequency of disputes concerning district courts' deference to foreign bankruptcy courts on international comity grounds confirms that this case does not "implicate this Nation's relations with other countries".

Moreover, this Court spoke to both the discretionary extension of comity to foreign rulings (*Hilton, supra*) and the application of international comity in the transnational bankruptcy context (*Gebhard, supra*) over one hundred years ago. The calm within the federal court system on these issues over the last one hundred-plus years belies any need for further review by this Court.

B. This case presents a poor vehicle for certiorari based on its unusual facts. Review of the panel majority's conclusions concerning the doctrine of comity will be of limited utility given the fact-specific nature of those conclusions. Petitioner asks that this court "address[] the effect of a foreign parent's insolvency proceeding on a U.S. subsidiary's claims against parties other than the foreign parent". (Pet. at 12; emphasis omitted) As demonstrated above, the Eleventh Circuit's treatment of that issue depended in large part on its determination that the subsidiary's claims arose out of transactions that had been judicially approved and ordered in the foreign parent's insolvency proceeding, in which the U.S. subsidiary actively participated and was represented by foreign legal counsel. Thus, Petitioner's question cannot be answered by a rigid rule of law; the "effect" is dependent on the particular claims involved in relation to the foreign insolvency.

Because the Eleventh Circuit's decision was focused on Petitioner's activities in the foreign reorganization case and the scope of the Korean bankruptcy court's Plan Approval Order, it is unlikely to spawn recurring problems. It is, to be sure, an unusual case, yet Petitioner seeks to have this Court craft a blanket rule for the application of international comity out of only a few swatches of precedential cloth.

C. In any event, the Eleventh Circuit's decision was correct as to the Suzuki Entities. The claims pending against the Suzuki Entities at the time of the district court's dismissal on comity grounds were (1) Petitioner's Eighth Claim for violation of the automatic stay under 11 U.S.C. § 362, (2) the Ninth Claim for unauthorized post-petition transfer under 11 U.S.C. § 549, and (3) the Eleventh Claim for violation of the Florida motor vehicle dealer statute.[21]

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[21] Petitioner's other claims directed against the Suzuki Entities – violation of California's Cartwright Act, unfair competition, violation of the Massachusetts motor vehicle dealer statute, and unjust enrichment –

All three appellate judges found that the claims based on the Bankruptcy Code lacked merit as a matter of law because, in view of the terms of the Distribution Agreement, Petitioner's bankruptcy estate simply did not include the assets transferred from DWMC to GMDAT under the Modified Reorganization Plan approved by the Korean court. (*Id.* at 12a-13a, 43a-45a) Petitioner does not challenge this finding in its Petition. Moreover, the panel majority and the concurring judge found that the "objective of these claims is the unwinding of the asset transfer"[22] that had been approved by the Korean court. By implication, Petitioner does not claim error as to that conclusion. (*See* p. 20, fn 15, *supra*; *see also* Pet. at 28, fn 11) Accordingly, all three appellate judges ruled that those claims should have been presented to the Korean court prior to its order of approval. (*Id.* at 16a-18a, 38a)

Lastly, although the majority and Judge Tjoflat differ in their reasoning, all three judges agreed that the Florida statutory claim fails as to all Respondents, including the Suzuki Entities. (Pet. App. at 16a-18a, 40a-45a)

Hence, even if this matter were to be remanded for *de novo* review, or for further determination of the application of comity to certain of Petitioner's damage claims, the result would be the same as to the Suzuki Entities.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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were dismissed with prejudice by the California bankruptcy court, before this matter was transferred to the Florida district court. The bankruptcy court's dismissal of the unjust enrichment claim was upheld by the Eleventh Circuit and is not a subject of this Petition. Petitioner did not appeal the dismissal of the remaining claims listed above.

[22] Judge Tjoflat, specially concurring, Pet. App. at 38a; *see also* Pet. App. at 16a-17a.

Respectfully submitted,

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No. 06-926

IN THE

Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,

Petitioner,

v.

GENERAL MOTORS CORPORATION
SUZUKI MOTOR CORPORATION
AMERICAN SUZUKI MOTOR CORPORATION, and
GM DAEWOO AUTO & TECHNOLOGY CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent General Motors Corporation states that it has no parent corporation. State Street Bank & Trust Company (acting in various fiduciary capacities for various employee benefit plans) is a publicly held company that beneficially owns more than 10% of General Motors Corporation's stock.

Respondent GM Daewoo Auto & Technology Co. states that it has no parent corporation. GM, though various subsidiaries, and respondent Suzuki Motor Corporation are publicly held corporations that own 10% or more of GMDAT's stock.

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INTRODUCTION

There is no conflict of federal authority on the questions presented by petitioner Daewoo America. The circuit courts agree that a district court's discretionary decision to extend comity to foreign proceedings or orders is reviewed for abuse of discretion — the standard applied by the Eleventh Circuit in this case when it affirmed the district court's decision to extend comity to the proceedings and orders of the South Korean court supervising the reorganization of Daewoo Motor Co., Ltd., petitioner's Korean parent. The case relied upon by petitioner is not to the contrary but in fact *agreed* that deferential review is appropriate when the district court abstains in the face of pending or available foreign proceedings. *Diorinou v. Mezitis*, 237 F.3d 133, 139 (2d Cir. 2001). Daewoo America consistently asserted below that it had an available forum in Korea for its tort and other damages claims, even though it consented under Korean law to the transfer of property about which it now complains. Based upon Daewoo America's own arguments and authority, the Eleventh Circuit applied the uniformly recognized standard.

The circuit courts are likewise consistent in their treatment of the preclusive effect of a court's order approving the sale of a debtor's assets. Every circuit that has considered the question has held that such a court-ordered transfer cannot be collaterally attacked through fraud and other damages claims directed at parties involved in the sale — even parties other than the debtor. *See, e.g., Gekas v. Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012, 1018 (7th Cir. 1988) (Posner, J.). The case relied upon by petitioner does not dispute, much less reject, this

principle or otherwise demonstrate a split of authority, but instead turns on the existence of facts materially different from those in this case. *See Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260 (3d Cir. 1987). Any claimed error in the application of the uniform principle to the particular facts of this case does not demonstrate a legal conflict.

The result in this case would be the same in any circuit. Further, the Eleventh Circuit's opinion establishes that petitioner's claims fail as a matter of law for reasons independent of the grounds raised in its petition. Since the result could not change on remand, there is no basis for this Court's review and Daewoo America's petition should be denied.

COUNTERSTATEMENT OF THE CASE

Because Daewoo America's statement of the case is incomplete and inaccurate, GM and GMDAT present the following restatement of the facts:

A. Factual Background

This case arises from the corporate reorganization — the largest in Korean history — of Daewoo Motor Co., Ltd. ("Daewoo Korea") and the sale, approved by the Korean court supervising that reorganization, of some of Daewoo Korea's manufacturing and other assets. Before its reorganization, Daewoo-brand vehicles manufactured by Daewoo Korea had been distributed in the United States by its subsidiary, Petitioner Daewoo America. Pet. App. 2-3a. Daewoo America was represented by counsel in Daewoo Korea's reorganization proceedings, actively participated in those proceedings, and filed substantial claims accepted by the receiver

appointed by the Korean court. *Id.* at 3-4a. At no time did Daewoo America object to the sale of Daewoo Korea's assets; instead, it consented to the sale under Korean law. *Id.* at 5-7a; CRA Art. 270-2, Doc 126, Ex 33, Tab B.

In the course of Daewoo Korea's insolvency proceedings, Daewoo Korea and GM entered into negotiations concerning various Daewoo Korea assets. Pet. App. 4a. These negotiations led eventually to a Master Transaction Agreement ("MTA") entered into in April 2002 among Daewoo Korea, its creditors, and GM. The MTA, which was immediately widely publicized, provided for the creation of a new company, Respondent GM Daewoo Auto & Technology Co. ("GMDAT"), to acquire certain of Daewoo Korea's assets, including plants that manufactured vehicles distributed by Daewoo America. *Id.* at 5a. Debts and liabilities not included in the transfer remained the responsibility of debtor Daewoo Korea under the MTA; Daewoo America was not included in the assets to be transferred. *Id.*; Doc. 64 pg 13. When the MTA was entered into, the receiver in Daewoo Korea's insolvency proceedings notified Daewoo America that its distribution agreement with Daewoo Korea would be terminated. *Id.* at 6a. After receiving this notice, Daewoo America filed, on May 16, 2002, Chapter 11 proceedings in the United States Bankruptcy Court for the Central District of California. *Id.*; Doc 122, Ex 1 - Pg 210, 214.

Four months later, Daewoo Korea filed with the Korean Court a modified plan of reorganization, which embodied the terms of the MTA. Pet. App. 6a. Despite ample notice that it was excluded from the transaction, and the opportunity to raise any

objections — including that the sale would end Daewoo Korea's production of Daewoo-branded vehicles and thus end Daewoo America's distribution of those vehicles — Daewoo America chose not to object to the sale of Daewoo Korea's assets in the Korean proceedings or to take any action in Daewoo America's own Chapter 11 proceedings to oppose the sale. *Id.* at 7a.

Daewoo Korea's creditors adopted and the Korean court approved the modified reorganization plan and the MTA at a creditors meeting scheduled specifically for that purpose in September 2002. *Id.* By deciding not to exercise its right to attend that meeting or to vote on or object to the modified plan and asset sale, Daewoo America consented to them under Korean law. *See* CRA Art. 270-2, Doc 126, Ex 33, Tab B. Indeed, Daewoo America benefited from approval of Daewoo Korea's modified plan, *see* Pet. App. 70a n.45, by becoming U.S. warranty administrator for Daewoo vehicles with funding provided under the MTA — as Daewoo America's own evidence showed below. Doc 144, Ex. 2, Ex. 1 – pgs 13, 59; *see also* Doc 64 – pg 13. The asset sale and related transactions closed a month later. Pet. App. 7a. Daewoo America did not appeal the Korean court's plan approval. *Id*; Doc 122, Ex 1 – Pg 129-30.

B. Procedural History

1. Trial Court Proceedings

More than a year after public announcement of the MTA and the filing of its Chapter 11 case, and ten months after the Korean court approved the asset sale with its consent, Daewoo America filed an adversary action against respondents in the Bankruptcy Court for the Central District of

California. Pet. App. 7a. Daewoo America alleged that the transfer of Daewoo Korea's assets, and respondents' participation in that transaction, were wrongful under state law and violated the automatic stay that arose upon the filing of Daewoo America's Chapter 11 petition. The following year, after the bankruptcy court partially ruled on respondents' motions to dismiss Daewoo America's amended complaint,[1] the Judicial Panel on Multidistrict Litigation transferred the action to the United States District Court for the Middle District of Florida, where a number of similar actions brought by individual Daewoo dealerships were pending. *Id.* at 8a.[2]

In the Middle District of Florida, the parties submitted supplemental briefs addressing the deference owed to the Korean proceedings under the doctrine of international comity. *Id.* Daewoo

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[1] The bankruptcy court dismissed with prejudice Daewoo America's amended claims for unfair competition, violation of the Massachusetts Dealer Act, and violation of the California Cartwright Act. Pet. App. 8a. It dismissed with leave to amend the claim under the Florida Dealer Act. *Id.* Daewoo America did not seek leave to amend the complaint and did not appeal those rulings.

[2] The actions brought by individual Daewoo dealers were eventually dismissed with prejudice, and no appeal of the dismissal was taken. *See* Pet. App. 28a n.9; *see also* Br. of Appellant, 11th Cir. No. 04-15878-I, Ex. 2. It was the voluntary decision of the plaintiff dealers to forego any appeal, not (as petitioner asserts) the Eleventh Circuit's application of comity in this case, that "effectively shut the courthouse doors" to Daewoo America's dealer network and creditors. Pet. 13; *see id.* at 22.

America argued, among other things, that its tort and other damages claims against respondents were "common benefit" and civil claims under Korean law that survived Daewoo Korea's reorganization proceedings and could be pursued in a Korean court. Doc. 142, Cho Aff. ¶¶ 13, 33, 36-37; Doc. 139, at 16-19; Doc. 138 at 15-16. After a lengthy hearing, the district court dismissed Daewoo America's remaining claims with prejudice. Pet. App. 48a.

The district court first held, as a matter of law, that Daewoo America had no right under its distribution agreement to a continued supply of Daewoo vehicles, and there was no violation of the automatic stay under the Bankruptcy Code. *Id.* at 60-61a. In short, the foundation for Daewoo America's claims crumbled before the court reached the issues presented in its petition.

The court also exercised its discretion to extend comity to the Korean court's orders approving the Modified Plan and MTA, finding that "[Daewoo America] had notice, as well as a full and fair opportunity to participate in all facets of the Korean bankruptcy process" and hence if it "objected to the relevant transactions and orders, it should have done so before the Korean tribunal." *Id.* at 69-71a. The district court denied Daewoo America's motion for reconsideration, and entered judgment for defendants. *Id.* at 72-73a.

DMA appealed, claiming that the district court had erred in applying the comity doctrine and again arguing that its claims could be pursued in Korean court. Br. of Appellant, 11th Cir. No. 04-15878-I, at 9-11, 40, Ex. 1, Cho Supp. Aff. ¶¶ 14, 20; Reply Br. of Appellant, 11th Cir. No. 04-15878-I, at 14.

2. The Court of Appeals' Decision

The Eleventh Circuit affirmed the district court's judgment in its entirety. All three judges on the panel agreed that Daewoo America's claims were properly dismissed. The court first held that "the principle of international comity applied in this case is an abstention doctrine," and hence, consistent with other abstention doctrines, is reviewed for abuse of discretion. Pet. App. 10a. Notwithstanding this standard for reviewing the comity decision, the court reviewed legal conclusions de novo and factual findings for clear error. *Id.*

The court next examined Daewoo's claims under the Bankruptcy Code, reviewing de novo the district court's interpretation of Daewoo America's distribution agreement with Daewoo Korea. *Id.* at 12-13a; *see id.* at 39a, 43-45a. The court agreed with the district court that this agreement "did not grant Daewoo America property rights in vehicles that are neither manufactured nor sold by Daewoo Korea. . . . The rights of Daewoo America under the Distribution Agreement did not extend to the manufacturing assets of Daewoo Korea transferred by the MTA." *Id.* at 12-13a; *see id.* 44-45a. And because the transaction approved by the Korean court had no effect on any property of Daewoo America, GM's and the other defendants' participation in that transaction did not violate the automatic stay or other provision of U.S. bankruptcy law. *Id.* at 12-13a; *see id.* at 45-46a. Daewoo America does not challenge or seek review of these holdings in this Court.

The court also concluded that the district court properly exercised its discretion to extend comity to

the Korean reorganization proceedings and orders. *Id.* at 13-15a. Daewoo America "had notice of the proceedings in the Korean bankruptcy and an opportunity to participate in those proceedings"; it had notice of and knew about "the final meeting of the creditors on September 30, 2002, to vote on the Modified Reorganization Plan" that included the asset sale; but "chose not to attend the meeting...or otherwise object to the Modified Reorganization Plan." *Id.* at 14-15a.

Moreover, the "district court did not abuse its discretion when it determined that the interests of Korea in regulating business activity on its shores and the interests of the courts in dispersing a debtor's assets equitably and systematically outweighed the prejudice to Daewoo America...." *Id.* at 15a. Indeed, Daewoo America's argument "ignores that 'the interest of the system as a whole — that of promoting a friendly intercourse between the sovereignties — also furthers American self-interest, especially where the workings of international trade and commerce are concerned.'" *Id.* 15a (citations omitted).

Given its recognition of the Korean court's approval of Daewoo Korea's asset sale and modified reorganization plan, granted after notice to Daewoo America, the panel unanimously concluded that Daewoo America could not collaterally attack those orders through tort and other claims alleging the asset sale was wrongful. The panel majority (Pryor and Alarcón, JJ.) specifically rejected Daewoo America's argument that, because at least some of

its claims purportedly could not have been raised in the Korean bankruptcy proceeding,[3] the doctrine of comity did not apply, reasoning that "[t]he validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court." *Id.* at 16a. As a result, "[t]he complaint of Daewoo America regarding the effect of the MTA should have been raised before the Korean Court" and "Daewoo America cannot now collaterally attack that order by bringing claims against the

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[3] That Daewoo America's claims *could* have been raised in a Korean court was undisputed. The courts below did not, as Daewoo America asserts, merely "assume[] that all of petitioner's claims could have been raised in the Korean proceeding." Pet. at 8. Rather, GM submitted evidence that, under Korean law, Daewoo America could have objected to the receiver's termination of the distribution agreement and the Korean reorganization court's approval of the modified reorganization plan and MTA (and to appeal those decisions, ultimately, to the Supreme Court of Korea), based on the allegations in its amended complaint. *See* Br. of Appellee General Motors Corp., 11th Cir. No. 04-15878-I, Ex. 1; Song Affidavit ¶¶ 4-7. For example, Daewoo America could have asserted, in objection to the plan under Korean law, that the transfer of asserts and modified plan were unlawful or unfairly impaired Daewoo America's interests, and also could have raised those issues on appeal in Korea. *Id.* Daewoo America did not contest these points of Korean law in the proceedings below, but instead argued that its fraud and other tort claims had to be pursued in Korean civil court separate from the reorganization proceedings. Br. of Appellant, 11th Cir. No. 04-15878-I, at 9-11, 40, Ex. 1, Cho Supp. Aff. ¶¶ 14, 20; Reply Br. of Appellant, 11th Cir. No. 04-15878-I, at 14. The question of the particular Korean court(s) in which petitioner could bring its claims ultimately depends on the content of Korean law and is immaterial to the application of comity. *See* Part II, *infra.*

recipients of the property transferred based on the approval by the Korean Court." *Id.*

Judge Tjoflat, specially concurring, agreed that Daewoo America's claim of aiding and abetting breach of fiduciary duty, as well as the bankruptcy code claims, were properly dismissed under the doctrine of international comity. *Id.* at 37-38a. Because he did not believe that comity resolved all of Daewoo America's claims, however, Judge Tjoflat analyzed the remaining claims on the merits, concluding that Daewoo America failed to state any claim upon which relief could be granted. *Id.* at 20a, 39a, 40-46a.

According to Judge Tjoflat, the state law claims premised on Daewoo America's purported right under the distribution agreement to a continuous supply of vehicles failed to state claims because, as the court held, that agreement did not provide Daewoo America with any right to vehicles after Daewoo Korea stopped manufacturing them and did not restrict Daewoo Korea's right to sell its manufacturing assets. *Id.* at 45a.

For similar reasons, Judge Tjoflat concluded that Daewoo America's fraud claim was properly dismissed. That claim was based on allegations that in reliance on GM's supposed assurances Daewoo America would be included in the eventual transaction, Daewoo America refrained from exercising its purported right to "oppose the acquisition." *Id.* at 45-46a. But because it had no right under its distribution agreement (other than through the reorganization proceeding itself) to prevent Daewoo Korea from selling its manufacturing assets, Daewoo America could not as

a matter of law allege damages resulting from its failure to exercise this alleged "right." *Id.* at 46a.[4] Of course, Daewoo America knew by May of 2002 that it was not included in the transaction defined by the MTA. The proposition that it refrained from objecting to Daewoo Korea's plan of reorganization five months later based on a contrary assumption is not colorable.

Daewoo America petitioned the Eleventh Circuit for rehearing en banc, but no active judge asked that the court be polled on the petition and rehearing was denied. *Id.* at 74-75a. Throughout the proceedings in the district and circuit courts, Daewoo Korea's insolvency proceedings were ongoing in Korea. *See* Br. of Appellee GM at 7 (citing Doc. 122, Ex. 1 - Pg 43-44, 50, 102, 250).

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[4] Daewoo America's remaining allegations of harm were, according to Judge Tjoflat, simply too vague to support a fraud claim. Pet. App. 46a n.26 (citing Fed. R. Civ. P. 9(b)). Petitioner's assertion that Judge Tjoflat's fraud analysis would be unavailable on remand is simply incorrect. *See* Pet. 10 n.4. As Judge Tjoflat noted, the court of appeals may affirm on "any legal ground regardless of the grounds addressed, adopted or rejected by the district court." Pet. App. 20a n.1 (citing *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992)). Furthermore, Judge Tjoflat reviewed petitioner's entire amended complaint, claim by claim, in a 28-page opinion. That he ultimately concluded petitioner failed to state a claim as a matter of law provides no basis for petitioner's assertion that his understanding was "truncated" or that its fraud claim "has never been reviewed" in its "entirety." Pet. 10-11 n.4.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuit Courts Of Appeals On The Standard For Reviewing A District Court's Application Of International Comity.

The Eleventh Circuit stated and applied the same standard of review uniformly applied by the circuit courts, including the Second Circuit: it reviewed the district court's comity decision for abuse of discretion, its legal determinations de novo, and its factual findings for clear error. Pet. App. 10a; *see JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 422 (2d Cir. 2005) ("international comity is a form of abstention, and we review a district court's decision to abstain on international comity grounds for abuse of discretion"); *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246-50 (2d Cir. 1999) ("We review a district court's decision to extend or deny comity ... for abuse of discretion"); *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993) ("since ... comity is within the court's discretion, we will reverse ... only [for] an abuse of discretion"); *see also Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1087 n.18 (9th Cir. 2006); *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana*, 347 F.3d 589, 593 (5th Cir. 2003); *Int'l Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001); *Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987); *In re Colorado Corp.*, 531 F.2d 463, 469 (10th Cir. 1976); *see generally Koon v. United States*, 518 U.S. 81, 100 (1996) ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.").

Daewoo America ignores this wealth of authority articulating a uniform standard, relying instead on dicta in a single case, *Diorinou v. Mezitis*, which suggested that a de novo standard might apply when the district court considers whether to enforce a foreign judgment or "accept the adjudication of a foreign tribunal on a cause of action or a particular issue." 237 F.3d 133, 139-40 (2d Cir. 2001).[5] But as the authorities cited above demonstrate, *Diorinou's* dicta has not been followed, even in the Second Circuit, which uniformly applies a deferential standard in reviewing international comity decisions. *See JP Morgan Chase Bank*, 412 F.3d at 422 (2d Cir. 2005); *Finanz AG Zurich*, 192 F.3d at 246-50 (2d Cir.1999); *Allstate Life Ins. Co.*, 994 F.2d at 999 (2d Cir. 1993); *see also, e.g., Int'l Nutrition Co.*, 257 F.3d at 1329 (Fed. Cir. 2001) (applying abuse-of-discretion standard to extension of comity to French court's determination of issue of patent ownership).

Equally important, *Diorinou* itself recognized that deferential review is appropriate when the district court "considers whether to proceed with litigation properly within its jurisdiction because of the pendency or availability of litigation in a foreign forum." 237 F.3d at 139. Thus, even if *Diorinou's* dicta were an accurate statement of Second Circuit law, and both prior and subsequent decisions show it

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[5] The court in *Diorinou* did not purport to definitively resolve the issue, *see* 237 F.3d at 140, and because it affirmed the district court's judgment notwithstanding its plenary review, its comments about the appropriate standard of review were, in the end, immaterial to the outcome.

is not, there would still be no conflict with the abuse-of-discretion standard employed in this case. Daewoo America argued in the Eleventh Circuit that it had "common benefit" and civil claims against GM under Korean law that survived the Korean reorganization proceedings and which were available to it in Korea. Br. of Appellant, 11th Cir. No. 04-15878-I, Ex. 1, Cho Supp. Aff. ¶ 20; Doc. 142, Cho Aff. ¶¶ 36-37) GM disagreed, but given Daewoo America's own arguments to the lower courts, it cannot now complain about the Eleventh Circuit's characterization of comity as a form of abstention — a characterization that puts deferential review of the district court's decision squarely within what petitioner calls the "well-reasoned" analysis in *Diorinou*. Pet. 13.[6]

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[6] Daewoo America asserts, without any record citation, that the proceedings in Korea "have been completed." Pet. 17. The undisputed record before the Eleventh Circuit was to the contrary. Br. of Appellee GM at 7 ("DMA's claims approved by the Receiver remain pending in [Daewoo Korea's] insolvency proceedings, and DMA expects to receive payment under [Daewoo Korea's] reorganization plan.") (citing Doc. 122, Ex. 1 - Pg 43-44, 50, 102, 250). Also contrary to the record is Daewoo America's characterization of the Korean and U.S. reorganization proceedings as "consecutive," Pet. 11, when Daewoo America in fact filed its Chapter 11 proceeding in the U.S. in May 2002, more than four months before Daewoo Korea's creditors adopted and the Korean court approved Daewoo Korea's modified reorganization plan and the MTA. Pet. App. 6-7a. That Daewoo America decided to wait nine months after the transaction closed in Korea before filing its complaint against defendants in the U.S. proceedings, *id.* at 7a, hardly provides a justification for a more searching standard of appellate review.

Furthermore, other than its mistaken reliance on cases applying res judicata, petitioner does not explain why de novo review is more appropriate than the abuse-of-discretion standard uniformly applied by the circuit courts. Its assertion that there is "no good reason why *foreign* judgments should receive different treatment" from domestic ones, *id.* at 21, misunderstands the governing principles and the law. Application of res judicata to a "domestic" judgment is not discretionary. *See San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 345 (2005) ("There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'") (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981)). By contrast, application of comity to foreign judgments or orders involves the exercise of discretion, *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), and, as Daewoo America acknowledges, Pet. 24, requires the court to weigh competing interests that are particular to individual cases. *Hilton*, 159 U.S. at 164.[7] No

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[7] Contrary to petitioner's assertions, Pet. 24, the Eleventh Circuit did not ignore this Court's instruction in *Hilton* to have "due regard" for the interests of U.S. citizens. *See* Pet. App. 13a (citing *Hilton*, 159 U.S. at 164); *compare* Pet. at 24. Instead, it held that the district court was within its discretion in weighing the competing considerations and concluding that Korea's interest "in regulating business activity on its shores," courts' interests in "dispersing a debtor's assets equitably and systematically," and America's self-interest in promoting "'a friendly intercourse between the sovereignties,'" outweighed any prejudice to U.S. creditors, Pet. App. 15a, which include Daewoo America and its unsecured creditors (the beneficiaries of petitioner's claims in this case). Pet. 4 n.2; *id.* at ii. This is

purpose is served by de novo review, which would require the reviewing court to re-weigh the relevant facts and exercise independent discretion, without any corresponding gains in uniformity. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("'Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.'") (quoting *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989)).

Finally, a remand on the standard of review would not change the outcome in this case. An erroneous application of a deferential standard of review matters only if the reviewing court disagrees with the lower court's conclusions but was constrained to affirm notwithstanding its disagreement. *Cf. Salve Regina College v. Russell*, 499 U.S. 225, 237 (1991) (noting that in many cases, "the application of a rule of deference in lieu of independent review will not affect the outcome of an appeal"). There is nothing in the Eleventh Circuit's opinion indicating any disagreement with the district court's analysis, or suggesting that the outcome in any way depended on deferring to the

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particularly true where, as here, Daewoo America (who as debtor in possession under Chapter 11 had a fiduciary duty to act in the best interests of its own creditors) knew of and participated in the Korean proceeding, and consented to the modified reorganization plan that included the MTA. That Daewoo America's creditors claim they might fare better under U.S. law does not bar application of comity. *Canada S. R. Co. v. Gebhard*, 109 U.S. 527, 539 (1883) (dismissing claims of U.S. creditors as barred by Canadian reorganization plan).

district court's discretion. Indeed, the opinion suggests the opposite.

For example, the court agreed, after de novo review, that the distribution agreement did not give DMA the rights it claimed. Pet. App. 12a. All three judges on the panel thus rejected the foundation for all of DMA's claims — *i.e.*, its purported right or expectation of continuing as a distributor of Daewoo vehicles after Daewoo Korea sold its assets and exited the business. Similarly, the panel majority scrutinized the district court's conclusion that Daewoo America's claims were impermissible collateral attacks on the Korean court's orders. Like the district court, the panel majority concluded that Daewoo America's claims "arise out of the same nucleus of operative facts considered by the Korean court. . . . The validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court." Pet. 16a; *see id.* at 17a. This holding reflects independent review and agreement with the district court's analysis, not mere deference.

In short, the purported conflict in the standard of review asserted by Daewoo Korea is illusory and provides no basis for granting the writ.

II. The Eleventh Circuit's Decision Is Consistent With The Law Applied By The Other Courts Of Appeals, Including The Third Circuit In *Remington Rand*.

There is no conflict of federal authority regarding the preclusive effect of a court's order approving the sale of a bankrupt debtor's assets. Every circuit to consider the question has held that fraud and other tort claims attacking or arising out of a domestic

court-ordered asset transfer — whether or not actually litigated in the reorganization proceedings, and even when brought against parties other than the debtor — are barred as improper collateral attacks on the sale proceedings. *See In re Met-L-Wood Corp.*, *supra*, 861 F.2d at 1018 (7th Cir. 1988) (holding that court's approval of asset sale barred tortious interference and fraud claims against the purchaser and others involved in the sale); *see also Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 731-32 (8th Cir. 2004) (plaintiff "is barred from raising ... allegations of injury caused by fraud or the misappropriation of assets that [it] failed to raise before the bankruptcy court"); *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1170 (10th Cir. 2000) (fraud and tortious interference claims against purchaser barred by order approving the sale); *Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.)*, 28 F.3d 965, 970-71 (9th Cir. 1994) (antitrust claims); *Southmark Props. v. Charles House Corp.*, 742 F.2d 862, 869, 872 (5th Cir. 1984) (fraud claim was a "not-so-thinly veiled attack on the prior reorganization orders"; "Appellants cannot now undo a judicial decree which they had a full opportunity to contest, and chose not to.").

In *Met-L-Wood*, for example, a sale of debtor's assets was ordered and confirmed by the court supervising the debtor's reorganization proceedings. 861 F.2d at 1015. After the proceedings were converted into a liquidation, the Chapter 7 trustee sued the purchaser (and others involved in the sale) for damages, claiming that the purchaser's fraud in connection with that sale injured the unsecured creditors. *Id.* at 1016. The Seventh Circuit affirmed dismissal of the trustee's complaint, holding that the

fraud claims against the purchasers on behalf of unsecured creditors who consented to the sale were barred by res judicata. *Id.* Claims on behalf of other unsecured creditors (some of whom lacked notice of the sale) were likewise barred, not by res judicata, but by the special preclusive effect of bankruptcy court orders approving the sale of assets. *Id.*

As Judge Posner explained, orders approving the asset sale precluded plaintiff's fraud claims for damages, including claims against the purchaser, even though the claims did not technically seek to rescind the sale: "[Plaintiff's] suit does not seek to rescind the sale. But by seeking heavy damages from the seller, the purchaser, the purchaser's purchaser ... [and others] that benefited from the sale, the suit is a thinly disguised collateral attack on the judgment confirming the sale." *Id.*; *see also In re Int'l Nutronics, Inc.*, 28 F.3d at 970 ("[T]he rights of [asset purchasers] to their purchase at the agreed price would clearly be impaired or destroyed by a successful antitrust recovery."); *Southmark Props.*, 742 F.2d at 869 ("Notwithstanding appellants' protestations to the contrary, it is obvious that their state court suit attempts — by seeking to strip [the purchaser] and its successor in title of any benefits received as a result of the reorganization sale — to effectively nullify that sale"); *see also* Pet. App. 18a (holding that "Daewoo America seeks to redistribute the assets that were transferred with the approval of the Korean Court.").

As these cases make clear, barring such claims promotes the fair and orderly distribution of a debtor's assets by encouraging creditors to raise their objections to the court supervising the sale — the court that is charged with determining whether

that sale is in the best interest of the debtor's estate and all of its creditors. *E.g.*, *In re Int'l Nutronics, Inc.*, 28 F.3d at 970 ("There is little purpose in the court's confirming a sale if it has no power or duty to determine whether the terms of sale are in the best interests of the estate."). The contrary result urged by petitioner — to allow creditors like Daewoo America to consent to and benefit from the sale and then attack it through tort claims against the purchasers — would allow individual creditors to avoid the priorities set under bankruptcy law. This is particularly troublesome here because Daewoo America seeks to keep payments it received and will receive as a result of Daewoo Korea's modified reorganization plan, including serving as the U.S. warranty administrator for Daewoo vehicles, yet at the same time collect damages from a transaction it claims was wrongful. Such a result ultimately would discourage sales of a debtor's assets (or drive down the price), to the detriment of all creditors. *Met-L-Wood*, 861 F.2d at 1019 ("Unless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets of bankrupt firms — and the principal losers (pun intended) will be unsecured creditors.").

Far from "extending greater preclusive effect to a foreign judgment than is available to a domestic judgment," Pet. 12, the Eleventh Circuit's approach is precisely the same as the uniform treatment under U.S. federal law of a domestic bankruptcy court's order approving the sale of a debtor's assets. Daewoo America, as a putative creditor of Daewoo Korea, was not entitled to any recovery based upon the sale of Daewoo Korea's assets other than as

determined by the Korean court whose responsibility it was to adjudicate the respective rights of creditors. Under well established law, the Eleventh Circuit properly applied these principles to give effect to the Korean court's orders. *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 539 (1883) ("Unless all parties in interest, wherever they reside, can be bound by the [foreign reorganization] arrangement which it is sought to have legalized the scheme may fail. . . . [T]he true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."); *cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964) ("An inquiry by United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question.") (citing *Hudson v. Guestier*, 4 Cranch (8 U.S.) 293, 294 (1807)). Indeed, none of the judges on the panel below doubted that international comity may be applied in this case to dismiss claims against parties other than the foreign debtor. *See* Pet. App. 38a (Tjoflat, J., concurring).

Nevertheless, Daewoo America claims that the Eleventh Circuit's decision conflicts with other authority. It first argues that, in barring claims against parties other than the debtor, the Eleventh Circuit's approach conflicts with a case in which the Third Circuit held that, without more, a foreign court's reorganization proceedings "cannot be used as a shield" by a party other than the debtor. *Remington Rand*, 830 F.2d at 1267. But in claiming such a conflict, Daewoo America ignores not only the authorities discussed above, but also both the facts

of *Remington Rand* and the Third Circuit's separate discussions of the effect of (i) orders approving reorganization plans, and (ii) orders approving the sale of a debtor's assets. Because the Eleventh Circuit's holding in this case was based not only on Daewoo Korea's bankruptcy proceedings (and approved reorganization plan), but also on the Korean court's specific approval of the debtor's sale of assets, Pet. App. 16a, the portion of *Remington Rand* relied on by Daewoo America is inapposite.

More to the point is the Third Circuit's separate discussion of the effect of a foreign court's order approving the sale of a debtor's assets. *Remington Rand*, 830 F.2d at 1266. In that discussion, which petitioner ignores, the court did not dispute, much less reject, the principle that an order approving the sale of a debtor's property barred claims against the purchaser. The court held only that the principle was unavailable on the facts before it because the complained-of transaction (the transfer of the debtor's trade secrets) was not approved by the foreign court and the plaintiff thus had no notice or opportunity to object to it. *Id.* In this case, by contrast, the district court found that Daewoo America had ample notice of and opportunity to object to the sale of assets which was specifically approved by the Korean court — a finding that Daewoo America does not challenge. The Third Circuit's conclusion in *Remington Rand*, based on materially different facts, does not conflict with the Eleventh Circuit's holding in this case.

Daewoo America's second argument is that its claims were not (and supposedly could not have been) litigated in the Korean reorganization proceedings, and hence the Eleventh Circuit's

approach conflicts with the "bedrock principle" that a party need not bring claims in a forum in which "it could not receive full relief." Pet. 27-29. In support, Daewoo America cites Eleventh Circuit cases applying this principle in determining the preclusive effect of domestic bankruptcy proceedings. *See In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1285 (11th Cir. 2006); *Kaiser Aerospace v. Teledyne Indus., Inc. (In re Piper Aircraft Corp.)*, 244 F.3d 1289 (11th Cir. 2001). But as these cases show, the question of the availability of "full recovery" depends not on whether the precise legal theories or claims could have been brought in the first forum, but rather whether plaintiff could have obtained complete relief by remedies available in that forum or, put differently, whether it could be "made whole" in the event its position was found meritorious. *See In re Atlanta Retail*, 456 F.3d at 1286; *In re Piper*, 244 F.3d at 1304. In both *Atlanta Retail* and *Piper*, plaintiffs could not obtain "full recovery" because their claims were independent of and separate from the court's approval of the reorganization plan, and therefore defeating the plan would not have vindicated the rights claimed by plaintiffs. *Atlanta Retail*, 456 F.3d at 1279, 1286 (holding that creditor's independent state law claim against another creditor was not barred "unless the resolution of that claim explicitly becomes an essential part of the bankruptcy plan"); *In re Piper*, 244 F.3d at 1304. By contrast, in this case, as the panel majority explained in distinguishing *Piper*, the "claims of Daewoo America rely entirely on the alleged invalidity of the transactions approved by the Korean court." Pet. App. 17a.

Regardless of how they are denominated, Daewoo America's objections and claims are "inextricably intertwined" with the MTA and modified plan, Pet. App. 18a, and therefore the Korean proceedings afforded Daewoo America an opportunity to obtain complete relief. The injury Daewoo America claims is the termination of its distribution agreement and the transfer of Daewoo Korea assets (but not Daewoo America itself) to GMDAT as provided by the MTA. The Korean forum gave Daewoo America a full and fair opportunity to attempt to defeat the modified plan and MTA, which (if successful) would have averted any alleged injury and rendered any claim for damages unnecessary and meaningless. Daewoo America admits as much in its petition, asserting that an indemnity provision covering claims "arising from the 'consummation of any Transactions'" under the MTA and modified plan covers *all* of its damages claims, including claims "based on respondent's conduct in terminating petitioner's vehicle supply, the related collateral effects of that termination, and respondents' use of the assets acquired from [Daewoo Korea]." *See* Pet. 29 & n.12.[8]

As the panel majority held, Daewoo America's "complaint ... regarding the effect of the MTA should

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[8] Petitioner's argument relying on the indemnification provision is frivolous. Pet. 29 n.12; *id.* at 24 n.8. That the parties to a court-approved transaction may have planned in advance for a particular class of contingencies (which arguably includes a potential collateral attack, no matter how meritless and contrary to law), and allocated the risk of those contingencies (no matter how remote), does not and cannot mean that a challenge to the transaction is somehow lawful.

have been raised before the Korean Court," Pet. App. 16a, a point on which Judge Tjoflat agreed in his concurrence. Pet. App. 38a ("Daewoo America cannot attack the MTA without also attacking the [Korean] Bankruptcy court's approval of it; the two are inextricably intertwined"). Any disagreement on the panel did not implicate the legal standard to be applied, but only its application to the particular claims asserted by Daewoo America. *See id.*

Similarly, petitioner is simply wrong in its assertion that the Eleventh Circuit's decision is "in serious tension if not outright conflict with" *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985), which petitioner claims held that "res judicata cannot bar a federal antitrust claim that was not within the jurisdiction of the state court that adjudicated the plaintiff's other claims." Pet. 27. In fact, *Marrese* held the opposite: "a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts." 470 U.S. at 380-81; *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) (state court settlement had preclusive effect in federal court and barred even exclusively federal claims that plaintiffs could not have brought in the state court proceedings). Moreover, *Marrese* addressed the relationship of state and federal judgments in the federal system and the application of the Full, Faith and Credit Act, 28 U.S.C. § 1738. The question posed by that case — whether a prior state court's judgment extinguishes exclusively federal claims — has little bearing on whether the Eleventh Circuit properly abstained from deciding tort and other claims that Daewoo America itself argued arose not from any exclusively

federal right but were independently actionable under Korean law and could be brought in that country. In short, *Marrese* and like cases cited by petitioner (*see* Pet. 27-28) have nothing to do with comity in general or the comity issues raised in this case. *Cf. Banco Nacional de Cuba*, 376 U.S. at 415 n.17 (distinguishing a court's inquiry into the "validity of an act of an official of a foreign state under the law of that state" from a review among state courts; in the latter instance, there is "similarity of legal structure and an impartial arbiter, this Court, applying the full faith and credit provision of the Federal Constitution.").

* * *

However the Court resolves the two questions on which Daewoo America seeks certiorari, its claims were properly dismissed, independent of comity, under the panel's unanimous conclusion that Daewoo America's distribution agreement (which the court reviewed de novo) "is not reasonably susceptible to an interpretation that would give Daewoo America any rights in the vehicles manufactured by GMDAT and sold by Chevrolet and Suzuki." Pet. App. 13a; *see also id.* at 45a.

This conclusion bars all of Daewoo America's claims, including those that petitioner argues were independent of the asset sale approved by the Korean Court and "based on respondents' conduct in terminating petitioner's vehicle supply, the related collateral effects of that termination, and respondents' use of the assets acquired from [Daewoo Korea]." *See* Pet. 29. As Judge Tjoflat explained in his special concurrence, because the agreement did not guarantee Daewoo America a

"continuous supply of vehicles and parts, even after GM and its partners purchased the Daewoo Korea Plants," and did not "restrict Daewoo Korea's ability to sell" those assets, claims relating to the termination of the vehicle supply and subsequent use of the assets fail as a matter of law. Pet. App. 39-40a, 45a. The court's ruling on the interpretation of the contract likewise bars petitioner's fraud claim. Because Daewoo America had no right under the agreement to stop or object to Daewoo Korea's sale of its assets (outside of Daewoo America's right as a creditor to object during the reorganization proceedings — which it was free to exercise after it knew it would not be among the assets sold), it could not have been damaged, as Judge Tjoflat explained, by purportedly refraining to exercise any such right in reliance on GM's alleged assurances that it would be included in the contemplated transaction. Pet. App. 46a & n.26.[9]

Petitioner has not and cannot show that the Eleventh Circuit's decision was inconsistent with any federal authority, raises any important unsettled federal question, or that the Court's resolution of the questions presented will even affect the outcome of this case. Further review by this Court is unnecessary and unwarranted.

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[9] Given the panel's unanimous rejection of Daewoo America's interpretation of the distribution agreement that forms the foundation for its claims, there is no basis for Daewoo America's "hope" that it could overcome these alternative grounds on remand. *See* Pet. 10 n.4.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for *certiorari*.

Respectfully submitted,

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No. 06-926

IN THE

Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,

Petitioner,

v.

GENERAL MOTORS CORPORATION
SUZUKI MOTOR CORPORATION
AMERICAN SUZUKI MOTOR CORPORATION, and
GM DAEWOO AUTO & TECHNOLOGY CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS GENERAL MOTORS CORPORATION AND GM DAEWOO AUTO & TECHNOLOGY CO.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent General Motors Corporation states that it has no parent corporation. State Street Bank & Trust Company (acting in various fiduciary capacities for various employee benefit plans) is a publicly held company that beneficially owns more than 10% of General Motors Corporation's stock.

Respondent GM Daewoo Auto & Technology Co. states that it has no parent corporation. GM, though various subsidiaries, and respondent Suzuki Motor Corporation are publicly held corporations that own 10% or more of GMDAT's stock.

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INTRODUCTION

There is no conflict of federal authority on the questions presented by petitioner Daewoo America. The circuit courts agree that a district court's discretionary decision to extend comity to foreign proceedings or orders is reviewed for abuse of discretion — the standard applied by the Eleventh Circuit in this case when it affirmed the district court's decision to extend comity to the proceedings and orders of the South Korean court supervising the reorganization of Daewoo Motor Co., Ltd., petitioner's Korean parent. The case relied upon by petitioner is not to the contrary but in fact *agreed* that deferential review is appropriate when the district court abstains in the face of pending or available foreign proceedings. *Diorinou v. Mezitis*, 237 F.3d 133, 139 (2d Cir. 2001). Daewoo America consistently asserted below that it had an available forum in Korea for its tort and other damages claims, even though it consented under Korean law to the transfer of property about which it now complains. Based upon Daewoo America's own arguments and authority, the Eleventh Circuit applied the uniformly recognized standard.

The circuit courts are likewise consistent in their treatment of the preclusive effect of a court's order approving the sale of a debtor's assets. Every circuit that has considered the question has held that such a court-ordered transfer cannot be collaterally attacked through fraud and other damages claims directed at parties involved in the sale — even parties other than the debtor. *See, e.g., Gekas v. Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012, 1018 (7th Cir. 1988) (Posner, J.). The case relied upon by petitioner does not dispute, much less reject, this

principle or otherwise demonstrate a split of authority, but instead turns on the existence of facts materially different from those in this case. *See Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260 (3d Cir. 1987). Any claimed error in the application of the uniform principle to the particular facts of this case does not demonstrate a legal conflict.

The result in this case would be the same in any circuit. Further, the Eleventh Circuit's opinion establishes that petitioner's claims fail as a matter of law for reasons independent of the grounds raised in its petition. Since the result could not change on remand, there is no basis for this Court's review and Daewoo America's petition should be denied.

COUNTERSTATEMENT OF THE CASE

Because Daewoo America's statement of the case is incomplete and inaccurate, GM and GMDAT present the following restatement of the facts:

A. Factual Background

This case arises from the corporate reorganization — the largest in Korean history — of Daewoo Motor Co., Ltd. ("Daewoo Korea") and the sale, approved by the Korean court supervising that reorganization, of some of Daewoo Korea's manufacturing and other assets. Before its reorganization, Daewoo-brand vehicles manufactured by Daewoo Korea had been distributed in the United States by its subsidiary, Petitioner Daewoo America. Pet. App. 2-3a. Daewoo America was represented by counsel in Daewoo Korea's reorganization proceedings, actively participated in those proceedings, and filed substantial claims accepted by the receiver

appointed by the Korean court. *Id.* at 3-4a. At no time did Daewoo America object to the sale of Daewoo Korea's assets; instead, it consented to the sale under Korean law. *Id.* at 5-7a; CRA Art. 270-2, Doc 126, Ex 33, Tab B.

In the course of Daewoo Korea's insolvency proceedings, Daewoo Korea and GM entered into negotiations concerning various Daewoo Korea assets. Pet. App. 4a. These negotiations led eventually to a Master Transaction Agreement ("MTA") entered into in April 2002 among Daewoo Korea, its creditors, and GM. The MTA, which was immediately widely publicized, provided for the creation of a new company, Respondent GM Daewoo Auto & Technology Co. ("GMDAT"), to acquire certain of Daewoo Korea's assets, including plants that manufactured vehicles distributed by Daewoo America. *Id.* at 5a. Debts and liabilities not included in the transfer remained the responsibility of debtor Daewoo Korea under the MTA; Daewoo America was not included in the assets to be transferred. *Id.*; Doc. 64 pg 13. When the MTA was entered into, the receiver in Daewoo Korea's insolvency proceedings notified Daewoo America that its distribution agreement with Daewoo Korea would be terminated. *Id.* at 6a. After receiving this notice, Daewoo America filed, on May 16, 2002, Chapter 11 proceedings in the United States Bankruptcy Court for the Central District of California. *Id.*; Doc 122, Ex 1 - Pg 210, 214.

Four months later, Daewoo Korea filed with the Korean Court a modified plan of reorganization, which embodied the terms of the MTA. Pet. App. 6a. Despite ample notice that it was excluded from the transaction, and the opportunity to raise any

objections — including that the sale would end Daewoo Korea's production of Daewoo-branded vehicles and thus end Daewoo America's distribution of those vehicles — Daewoo America chose not to object to the sale of Daewoo Korea's assets in the Korean proceedings or to take any action in Daewoo America's own Chapter 11 proceedings to oppose the sale. *Id.* at 7a.

Daewoo Korea's creditors adopted and the Korean court approved the modified reorganization plan and the MTA at a creditors meeting scheduled specifically for that purpose in September 2002. *Id.* By deciding not to exercise its right to attend that meeting or to vote on or object to the modified plan and asset sale, Daewoo America consented to them under Korean law. *See* CRA Art. 270-2, Doc 126, Ex 33, Tab B. Indeed, Daewoo America benefited from approval of Daewoo Korea's modified plan, *see* Pet. App. 70a n.45, by becoming U.S. warranty administrator for Daewoo vehicles with funding provided under the MTA — as Daewoo America's own evidence showed below. Doc 144, Ex. 2, Ex. 1 – pgs 13, 59; *see also* Doc 64 – pg 13. The asset sale and related transactions closed a month later. Pet. App. 7a. Daewoo America did not appeal the Korean court's plan approval. *Id*; Doc 122, Ex 1 – Pg 129-30.

B. Procedural History

1. Trial Court Proceedings

More than a year after public announcement of the MTA and the filing of its Chapter 11 case, and ten months after the Korean court approved the asset sale with its consent, Daewoo America filed an adversary action against respondents in the Bankruptcy Court for the Central District of

California. Pet. App. 7a. Daewoo America alleged that the transfer of Daewoo Korea's assets, and respondents' participation in that transaction, were wrongful under state law and violated the automatic stay that arose upon the filing of Daewoo America's Chapter 11 petition. The following year, after the bankruptcy court partially ruled on respondents' motions to dismiss Daewoo America's amended complaint,[1] the Judicial Panel on Multidistrict Litigation transferred the action to the United States District Court for the Middle District of Florida, where a number of similar actions brought by individual Daewoo dealerships were pending. *Id.* at 8a.[2]

In the Middle District of Florida, the parties submitted supplemental briefs addressing the deference owed to the Korean proceedings under the doctrine of international comity. *Id.* Daewoo

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[1] The bankruptcy court dismissed with prejudice Daewoo America's amended claims for unfair competition, violation of the Massachusetts Dealer Act, and violation of the California Cartwright Act. Pet. App. 8a. It dismissed with leave to amend the claim under the Florida Dealer Act. *Id.* Daewoo America did not seek leave to amend the complaint and did not appeal those rulings.

[2] The actions brought by individual Daewoo dealers were eventually dismissed with prejudice, and no appeal of the dismissal was taken. *See* Pet. App. 28a n.9; *see also* Br. of Appellant, 11th Cir. No. 04-15878-I, Ex. 2. It was the voluntary decision of the plaintiff dealers to forego any appeal, not (as petitioner asserts) the Eleventh Circuit's application of comity in this case, that "effectively shut the courthouse doors" to Daewoo America's dealer network and creditors. Pet. 13; *see id.* at 22.

America argued, among other things, that its tort and other damages claims against respondents were "common benefit" and civil claims under Korean law that survived Daewoo Korea's reorganization proceedings and could be pursued in a Korean court. Doc. 142, Cho Aff. ¶¶ 13, 33, 36-37; Doc. 139, at 16-19; Doc. 138 at 15-16. After a lengthy hearing, the district court dismissed Daewoo America's remaining claims with prejudice. Pet. App. 48a.

The district court first held, as a matter of law, that Daewoo America had no right under its distribution agreement to a continued supply of Daewoo vehicles, and there was no violation of the automatic stay under the Bankruptcy Code. *Id.* at 60-61a. In short, the foundation for Daewoo America's claims crumbled before the court reached the issues presented in its petition.

The court also exercised its discretion to extend comity to the Korean court's orders approving the Modified Plan and MTA, finding that "[Daewoo America] had notice, as well as a full and fair opportunity to participate in all facets of the Korean bankruptcy process" and hence if it "objected to the relevant transactions and orders, it should have done so before the Korean tribunal." *Id.* at 69-71a. The district court denied Daewoo America's motion for reconsideration, and entered judgment for defendants. *Id.* at 72-73a.

DMA appealed, claiming that the district court had erred in applying the comity doctrine and again arguing that its claims could be pursued in Korean court. Br. of Appellant, 11th Cir. No. 04-15878-I, at 9-11, 40, Ex. 1, Cho Supp. Aff. ¶¶ 14, 20; Reply Br. of Appellant, 11th Cir. No. 04-15878-I, at 14.

2. The Court of Appeals' Decision

The Eleventh Circuit affirmed the district court's judgment in its entirety. All three judges on the panel agreed that Daewoo America's claims were properly dismissed. The court first held that "the principle of international comity applied in this case is an abstention doctrine," and hence, consistent with other abstention doctrines, is reviewed for abuse of discretion. Pet. App. 10a. Notwithstanding this standard for reviewing the comity decision, the court reviewed legal conclusions de novo and factual findings for clear error. *Id.*

The court next examined Daewoo's claims under the Bankruptcy Code, reviewing de novo the district court's interpretation of Daewoo America's distribution agreement with Daewoo Korea. *Id.* at 12-13a; *see id.* at 39a, 43-45a. The court agreed with the district court that this agreement "did not grant Daewoo America property rights in vehicles that are neither manufactured nor sold by Daewoo Korea. . . . The rights of Daewoo America under the Distribution Agreement did not extend to the manufacturing assets of Daewoo Korea transferred by the MTA." *Id.* at 12-13a; *see id.* 44-45a. And because the transaction approved by the Korean court had no effect on any property of Daewoo America, GM's and the other defendants' participation in that transaction did not violate the automatic stay or other provision of U.S. bankruptcy law. *Id.* at 12-13a; *see id.* at 45-46a. Daewoo America does not challenge or seek review of these holdings in this Court.

The court also concluded that the district court properly exercised its discretion to extend comity to

the Korean reorganization proceedings and orders. *Id.* at 13-15a. Daewoo America "had notice of the proceedings in the Korean bankruptcy and an opportunity to participate in those proceedings"; it had notice of and knew about "the final meeting of the creditors on September 30, 2002, to vote on the Modified Reorganization Plan" that included the asset sale; but "chose not to attend the meeting...or otherwise object to the Modified Reorganization Plan." *Id.* at 14-15a.

Moreover, the "district court did not abuse its discretion when it determined that the interests of Korea in regulating business activity on its shores and the interests of the courts in dispersing a debtor's assets equitably and systematically outweighed the prejudice to Daewoo America...." *Id.* at 15a. Indeed, Daewoo America's argument "ignores that 'the interest of the system as a whole — that of promoting a friendly intercourse between the sovereignties — also furthers American self-interest, especially where the workings of international trade and commerce are concerned.'" *Id.* 15a (citations omitted).

Given its recognition of the Korean court's approval of Daewoo Korea's asset sale and modified reorganization plan, granted after notice to Daewoo America, the panel unanimously concluded that Daewoo America could not collaterally attack those orders through tort and other claims alleging the asset sale was wrongful. The panel majority (Pryor and Alarcón, JJ.) specifically rejected Daewoo America's argument that, because at least some of

its claims purportedly could not have been raised in the Korean bankruptcy proceeding,[3] the doctrine of comity did not apply, reasoning that "[t]he validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court." *Id.* at 16a. As a result, "[t]he complaint of Daewoo America regarding the effect of the MTA should have been raised before the Korean Court" and "Daewoo America cannot now collaterally attack that order by bringing claims against the

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[3] That Daewoo America's claims *could* have been raised in a Korean court was undisputed. The courts below did not, as Daewoo America asserts, merely "assume[] that all of petitioner's claims could have been raised in the Korean proceeding." Pet. at 8. Rather, GM submitted evidence that, under Korean law, Daewoo America could have objected to the receiver's termination of the distribution agreement and the Korean reorganization court's approval of the modified reorganization plan and MTA (and to appeal those decisions, ultimately, to the Supreme Court of Korea), based on the allegations in its amended complaint. *See* Br. of Appellee General Motors Corp., 11th Cir. No. 04-15878-I, Ex. 1; Song Affidavit ¶¶ 4-7. For example, Daewoo America could have asserted, in objection to the plan under Korean law, that the transfer of asserts and modified plan were unlawful or unfairly impaired Daewoo America's interests, and also could have raised those issues on appeal in Korea. *Id.* Daewoo America did not contest these points of Korean law in the proceedings below, but instead argued that its fraud and other tort claims had to be pursued in Korean civil court separate from the reorganization proceedings. Br. of Appellant, 11th Cir. No. 04-15878-I, at 9-11, 40, Ex. 1, Cho Supp. Aff. ¶¶ 14, 20; Reply Br. of Appellant, 11th Cir. No. 04-15878-I, at 14. The question of the particular Korean court(s) in which petitioner could bring its claims ultimately depends on the content of Korean law and is immaterial to the application of comity. *See* Part II, *infra*.

recipients of the property transferred based on the approval by the Korean Court." *Id.*

Judge Tjoflat, specially concurring, agreed that Daewoo America's claim of aiding and abetting breach of fiduciary duty, as well as the bankruptcy code claims, were properly dismissed under the doctrine of international comity. *Id.* at 37-38a. Because he did not believe that comity resolved all of Daewoo America's claims, however, Judge Tjoflat analyzed the remaining claims on the merits, concluding that Daewoo America failed to state any claim upon which relief could be granted. *Id.* at 20a, 39a, 40-46a.

According to Judge Tjoflat, the state law claims premised on Daewoo America's purported right under the distribution agreement to a continuous supply of vehicles failed to state claims because, as the court held, that agreement did not provide Daewoo America with any right to vehicles after Daewoo Korea stopped manufacturing them and did not restrict Daewoo Korea's right to sell its manufacturing assets. *Id.* at 45a.

For similar reasons, Judge Tjoflat concluded that Daewoo America's fraud claim was properly dismissed. That claim was based on allegations that in reliance on GM's supposed assurances Daewoo America would be included in the eventual transaction, Daewoo America refrained from exercising its purported right to "oppose the acquisition." *Id.* at 45-46a. But because it had no right under its distribution agreement (other than through the reorganization proceeding itself) to prevent Daewoo Korea from selling its manufacturing assets, Daewoo America could not as

a matter of law allege damages resulting from its failure to exercise this alleged "right." *Id.* at 46a.[4] Of course, Daewoo America knew by May of 2002 that it was not included in the transaction defined by the MTA. The proposition that it refrained from objecting to Daewoo Korea's plan of reorganization five months later based on a contrary assumption is not colorable.

Daewoo America petitioned the Eleventh Circuit for rehearing en banc, but no active judge asked that the court be polled on the petition and rehearing was denied. *Id.* at 74-75a. Throughout the proceedings in the district and circuit courts, Daewoo Korea's insolvency proceedings were ongoing in Korea. *See* Br. of Appellee GM at 7 (citing Doc. 122, Ex. 1 - Pg 43-44, 50, 102, 250).

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[4] Daewoo America's remaining allegations of harm were, according to Judge Tjoflat, simply too vague to support a fraud claim. Pet. App. 46a n.26 (citing Fed. R. Civ. P. 9(b)). Petitioner's assertion that Judge Tjoflat's fraud analysis would be unavailable on remand is simply incorrect. *See* Pet. 10 n.4. As Judge Tjoflat noted, the court of appeals may affirm on "any legal ground regardless of the grounds addressed, adopted or rejected by the district court." Pet. App. 20a n.1 (citing *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992)). Furthermore, Judge Tjoflat reviewed petitioner's entire amended complaint, claim by claim, in a 28-page opinion. That he ultimately concluded petitioner failed to state a claim as a matter of law provides no basis for petitioner's assertion that his understanding was "truncated" or that its fraud claim "has never been reviewed" in its "entirety." Pet. 10-11 n.4.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuit Courts Of Appeals On The Standard For Reviewing A District Court's Application Of International Comity.

The Eleventh Circuit stated and applied the same standard of review uniformly applied by the circuit courts, including the Second Circuit: it reviewed the district court's comity decision for abuse of discretion, its legal determinations de novo, and its factual findings for clear error. Pet. App. 10a; *see JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 422 (2d Cir. 2005) ("international comity is a form of abstention, and we review a district court's decision to abstain on international comity grounds for abuse of discretion"); *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246-50 (2d Cir. 1999) ("We review a district court's decision to extend or deny comity ... for abuse of discretion"); *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993) ("since ... comity is within the court's discretion, we will reverse ... only [for] an abuse of discretion"); *see also Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1087 n.18 (9th Cir. 2006); *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana*, 347 F.3d 589, 593 (5th Cir. 2003); *Int'l Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001); *Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987); *In re Colorado Corp.*, 531 F.2d 463, 469 (10th Cir. 1976); *see generally Koon v. United States*, 518 U.S. 81, 100 (1996) ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.").

Daewoo America ignores this wealth of authority articulating a uniform standard, relying instead on dicta in a single case, *Diorinou v. Mezitis*, which suggested that a de novo standard might apply when the district court considers whether to enforce a foreign judgment or "accept the adjudication of a foreign tribunal on a cause of action or a particular issue." 237 F.3d 133, 139-40 (2d Cir. 2001).[5] But as the authorities cited above demonstrate, *Diorinou's* dicta has not been followed, even in the Second Circuit, which uniformly applies a deferential standard in reviewing international comity decisions. *See JP Morgan Chase Bank*, 412 F.3d at 422 (2d Cir. 2005); *Finanz AG Zurich*, 192 F.3d at 246-50 (2d Cir.1999); *Allstate Life Ins. Co.*, 994 F.2d at 999 (2d Cir. 1993); *see also, e.g., Int'l Nutrition Co.*, 257 F.3d at 1329 (Fed. Cir. 2001) (applying abuse-of-discretion standard to extension of comity to French court's determination of issue of patent ownership).

Equally important, *Diorinou* itself recognized that deferential review is appropriate when the district court "considers whether to proceed with litigation properly within its jurisdiction because of the pendency or availability of litigation in a foreign forum." 237 F.3d at 139. Thus, even if *Diorinou's* dicta were an accurate statement of Second Circuit law, and both prior and subsequent decisions show it

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[5] The court in *Diorinou* did not purport to definitively resolve the issue, *see* 237 F.3d at 140, and because it affirmed the district court's judgment notwithstanding its plenary review, its comments about the appropriate standard of review were, in the end, immaterial to the outcome.

is not, there would still be no conflict with the abuse-of-discretion standard employed in this case. Daewoo America argued in the Eleventh Circuit that it had "common benefit" and civil claims against GM under Korean law that survived the Korean reorganization proceedings and which were available to it in Korea. Br. of Appellant, 11th Cir. No. 04-15878-I, Ex. 1, Cho Supp. Aff. ¶ 20; Doc. 142, Cho Aff. ¶¶ 36-37) GM disagreed, but given Daewoo America's own arguments to the lower courts, it cannot now complain about the Eleventh Circuit's characterization of comity as a form of abstention — a characterization that puts deferential review of the district court's decision squarely within what petitioner calls the "well-reasoned" analysis in *Diorinou*. Pet. 13.[6]

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[6] Daewoo America asserts, without any record citation, that the proceedings in Korea "have been completed." Pet. 17. The undisputed record before the Eleventh Circuit was to the contrary. Br. of Appellee GM at 7 ("DMA's claims approved by the Receiver remain pending in [Daewoo Korea's] insolvency proceedings, and DMA expects to receive payment under [Daewoo Korea's] reorganization plan.") (citing Doc. 122, Ex. 1 - Pg 43-44, 50, 102, 250). Also contrary to the record is Daewoo America's characterization of the Korean and U.S. reorganization proceedings as "consecutive," Pet. 11, when Daewoo America in fact filed its Chapter 11 proceeding in the U.S. in May 2002, more than four months before Daewoo Korea's creditors adopted and the Korean court approved Daewoo Korea's modified reorganization plan and the MTA. Pet. App. 6-7a. That Daewoo America decided to wait nine months after the transaction closed in Korea before filing its complaint against defendants in the U.S. proceedings, *id.* at 7a, hardly provides a justification for a more searching standard of appellate review.

Furthermore, other than its mistaken reliance on cases applying res judicata, petitioner does not explain why de novo review is more appropriate than the abuse-of-discretion standard uniformly applied by the circuit courts. Its assertion that there is "no good reason why *foreign* judgments should receive different treatment" from domestic ones, *id.* at 21, misunderstands the governing principles and the law. Application of res judicata to a "domestic" judgment is not discretionary. *See San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 345 (2005) ("There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'") (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981)). By contrast, application of comity to foreign judgments or orders involves the exercise of discretion, *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), and, as Daewoo America acknowledges, Pet. 24, requires the court to weigh competing interests that are particular to individual cases. *Hilton*, 159 U.S. at 164.[7] No

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[7] Contrary to petitioner's assertions, Pet. 24, the Eleventh Circuit did not ignore this Court's instruction in *Hilton* to have "due regard" for the interests of U.S. citizens. *See* Pet. App. 13a (citing *Hilton*, 159 U.S. at 164); *compare* Pet. at 24. Instead, it held that the district court was within its discretion in weighing the competing considerations and concluding that Korea's interest "in regulating business activity on its shores," courts' interests in "dispersing a debtor's assets equitably and systematically," and America's self-interest in promoting "'a friendly intercourse between the sovereignties,'" outweighed any prejudice to U.S. creditors, Pet. App. 15a, which include Daewoo America and its unsecured creditors (the beneficiaries of petitioner's claims in this case). Pet. 4 n.2; *id.* at ii. This is

purpose is served by de novo review, which would require the reviewing court to re-weigh the relevant facts and exercise independent discretion, without any corresponding gains in uniformity. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("'Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.'") (quoting *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989)).

Finally, a remand on the standard of review would not change the outcome in this case. An erroneous application of a deferential standard of review matters only if the reviewing court disagrees with the lower court's conclusions but was constrained to affirm notwithstanding its disagreement. *Cf. Salve Regina College v. Russell*, 499 U.S. 225, 237 (1991) (noting that in many cases, "the application of a rule of deference in lieu of independent review will not affect the outcome of an appeal"). There is nothing in the Eleventh Circuit's opinion indicating any disagreement with the district court's analysis, or suggesting that the outcome in any way depended on deferring to the

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particularly true where, as here, Daewoo America (who as debtor in possession under Chapter 11 had a fiduciary duty to act in the best interests of its own creditors) knew of and participated in the Korean proceeding, and consented to the modified reorganization plan that included the MTA. That Daewoo America's creditors claim they might fare better under U.S. law does not bar application of comity. *Canada S. R. Co. v. Gebhard*, 109 U.S. 527, 539 (1883) (dismissing claims of U.S. creditors as barred by Canadian reorganization plan).

district court's discretion. Indeed, the opinion suggests the opposite.

For example, the court agreed, after de novo review, that the distribution agreement did not give DMA the rights it claimed. Pet. App. 12a. All three judges on the panel thus rejected the foundation for all of DMA's claims — *i.e.*, its purported right or expectation of continuing as a distributor of Daewoo vehicles after Daewoo Korea sold its assets and exited the business. Similarly, the panel majority scrutinized the district court's conclusion that Daewoo America's claims were impermissible collateral attacks on the Korean court's orders. Like the district court, the panel majority concluded that Daewoo America's claims "arise out of the same nucleus of operative facts considered by the Korean court. . . . The validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court." Pet. 16a; *see id.* at 17a. This holding reflects independent review and agreement with the district court's analysis, not mere deference.

In short, the purported conflict in the standard of review asserted by Daewoo Korea is illusory and provides no basis for granting the writ.

II. The Eleventh Circuit's Decision Is Consistent With The Law Applied By The Other Courts Of Appeals, Including The Third Circuit In *Remington Rand*.

There is no conflict of federal authority regarding the preclusive effect of a court's order approving the sale of a bankrupt debtor's assets. Every circuit to consider the question has held that fraud and other tort claims attacking or arising out of a domestic

court-ordered asset transfer — whether or not actually litigated in the reorganization proceedings, and even when brought against parties other than the debtor — are barred as improper collateral attacks on the sale proceedings. *See In re Met-L-Wood Corp.*, *supra*, 861 F.2d at 1018 (7th Cir. 1988) (holding that court's approval of asset sale barred tortious interference and fraud claims against the purchaser and others involved in the sale); *see also Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 731-32 (8th Cir. 2004) (plaintiff "is barred from raising ... allegations of injury caused by fraud or the misappropriation of assets that [it] failed to raise before the bankruptcy court"); *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1170 (10th Cir. 2000) (fraud and tortious interference claims against purchaser barred by order approving the sale); *Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.)*, 28 F.3d 965, 970-71 (9th Cir. 1994) (antitrust claims); *Southmark Props. v. Charles House Corp.*, 742 F.2d 862, 869, 872 (5th Cir. 1984) (fraud claim was a "not-so-thinly veiled attack on the prior reorganization orders"; "Appellants cannot now undo a judicial decree which they had a full opportunity to contest, and chose not to.").

In *Met-L-Wood*, for example, a sale of debtor's assets was ordered and confirmed by the court supervising the debtor's reorganization proceedings. 861 F.2d at 1015. After the proceedings were converted into a liquidation, the Chapter 7 trustee sued the purchaser (and others involved in the sale) for damages, claiming that the purchaser's fraud in connection with that sale injured the unsecured creditors. *Id.* at 1016. The Seventh Circuit affirmed dismissal of the trustee's complaint, holding that the

fraud claims against the purchasers on behalf of unsecured creditors who consented to the sale were barred by res judicata. *Id.* Claims on behalf of other unsecured creditors (some of whom lacked notice of the sale) were likewise barred, not by res judicata, but by the special preclusive effect of bankruptcy court orders approving the sale of assets. *Id.*

As Judge Posner explained, orders approving the asset sale precluded plaintiff's fraud claims for damages, including claims against the purchaser, even though the claims did not technically seek to rescind the sale: "[Plaintiff's] suit does not seek to rescind the sale. But by seeking heavy damages from the seller, the purchaser, the purchaser's purchaser ... [and others] that benefited from the sale, the suit is a thinly disguised collateral attack on the judgment confirming the sale." *Id.*; *see also In re Int'l Nutronics, Inc.*, 28 F.3d at 970 ("[T]he rights of [asset purchasers] to their purchase at the agreed price would clearly be impaired or destroyed by a successful antitrust recovery."); *Southmark Props.*, 742 F.2d at 869 ("Notwithstanding appellants' protestations to the contrary, it is obvious that their state court suit attempts — by seeking to strip [the purchaser] and its successor in title of any benefits received as a result of the reorganization sale — to effectively nullify that sale"); *see also* Pet. App. 18a (holding that "Daewoo America seeks to redistribute the assets that were transferred with the approval of the Korean Court.").

As these cases make clear, barring such claims promotes the fair and orderly distribution of a debtor's assets by encouraging creditors to raise their objections to the court supervising the sale — the court that is charged with determining whether

that sale is in the best interest of the debtor's estate and all of its creditors. *E.g., In re Int'l Nutronics, Inc.*, 28 F.3d at 970 ("There is little purpose in the court's confirming a sale if it has no power or duty to determine whether the terms of sale are in the best interests of the estate."). The contrary result urged by petitioner — to allow creditors like Daewoo America to consent to and benefit from the sale and then attack it through tort claims against the purchasers — would allow individual creditors to avoid the priorities set under bankruptcy law. This is particularly troublesome here because Daewoo America seeks to keep payments it received and will receive as a result of Daewoo Korea's modified reorganization plan, including serving as the U.S. warranty administrator for Daewoo vehicles, yet at the same time collect damages from a transaction it claims was wrongful. Such a result ultimately would discourage sales of a debtor's assets (or drive down the price), to the detriment of all creditors. *Met-L-Wood*, 861 F.2d at 1019 ("Unless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets of bankrupt firms — and the principal losers (pun intended) will be unsecured creditors.").

Far from "extending greater preclusive effect to a foreign judgment than is available to a domestic judgment," Pet. 12, the Eleventh Circuit's approach is precisely the same as the uniform treatment under U.S. federal law of a domestic bankruptcy court's order approving the sale of a debtor's assets. Daewoo America, as a putative creditor of Daewoo Korea, was not entitled to any recovery based upon the sale of Daewoo Korea's assets other than as

determined by the Korean court whose responsibility it was to adjudicate the respective rights of creditors. Under well established law, the Eleventh Circuit properly applied these principles to give effect to the Korean court's orders. *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 539 (1883) ("Unless all parties in interest, wherever they reside, can be bound by the [foreign reorganization] arrangement which it is sought to have legalized the scheme may fail. . . . [T]he true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."); *cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964) ("An inquiry by United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question.") (citing *Hudson v. Guestier*, 4 Cranch (8 U.S.) 293, 294 (1807)). Indeed, none of the judges on the panel below doubted that international comity may be applied in this case to dismiss claims against parties other than the foreign debtor. *See* Pet. App. 38a (Tjoflat, J., concurring).

Nevertheless, Daewoo America claims that the Eleventh Circuit's decision conflicts with other authority. It first argues that, in barring claims against parties other than the debtor, the Eleventh Circuit's approach conflicts with a case in which the Third Circuit held that, without more, a foreign court's reorganization proceedings "cannot be used as a shield" by a party other than the debtor. *Remington Rand*, 830 F.2d at 1267. But in claiming such a conflict, Daewoo America ignores not only the authorities discussed above, but also both the facts

of *Remington Rand* and the Third Circuit's separate discussions of the effect of (i) orders approving reorganization plans, and (ii) orders approving the sale of a debtor's assets. Because the Eleventh Circuit's holding in this case was based not only on Daewoo Korea's bankruptcy proceedings (and approved reorganization plan), but also on the Korean court's specific approval of the debtor's sale of assets, Pet. App. 16a, the portion of *Remington Rand* relied on by Daewoo America is inapposite.

More to the point is the Third Circuit's separate discussion of the effect of a foreign court's order approving the sale of a debtor's assets. *Remington Rand*, 830 F.2d at 1266. In that discussion, which petitioner ignores, the court did not dispute, much less reject, the principle that an order approving the sale of a debtor's property barred claims against the purchaser. The court held only that the principle was unavailable on the facts before it because the complained-of transaction (the transfer of the debtor's trade secrets) was not approved by the foreign court and the plaintiff thus had no notice or opportunity to object to it. *Id.* In this case, by contrast, the district court found that Daewoo America had ample notice of and opportunity to object to the sale of assets which was specifically approved by the Korean court — a finding that Daewoo America does not challenge. The Third Circuit's conclusion in *Remington Rand*, based on materially different facts, does not conflict with the Eleventh Circuit's holding in this case.

Daewoo America's second argument is that its claims were not (and supposedly could not have been) litigated in the Korean reorganization proceedings, and hence the Eleventh Circuit's

approach conflicts with the "bedrock principle" that a party need not bring claims in a forum in which "it could not receive full relief." Pet. 27-29. In support, Daewoo America cites Eleventh Circuit cases applying this principle in determining the preclusive effect of domestic bankruptcy proceedings. *See In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1285 (11th Cir. 2006); *Kaiser Aerospace v. Teledyne Indus., Inc. (In re Piper Aircraft Corp.)*, 244 F.3d 1289 (11th Cir. 2001). But as these cases show, the question of the availability of "full recovery" depends not on whether the precise legal theories or claims could have been brought in the first forum, but rather whether plaintiff could have obtained complete relief by remedies available in that forum or, put differently, whether it could be "made whole" in the event its position was found meritorious. *See In re Atlanta Retail*, 456 F.3d at 1286; *In re Piper*, 244 F.3d at 1304. In both *Atlanta Retail* and *Piper*, plaintiffs could not obtain "full recovery" because their claims were independent of and separate from the court's approval of the reorganization plan, and therefore defeating the plan would not have vindicated the rights claimed by plaintiffs. *Atlanta Retail*, 456 F.3d at 1279, 1286 (holding that creditor's independent state law claim against another creditor was not barred "unless the resolution of that claim explicitly becomes an essential part of the bankruptcy plan"); *In re Piper*, 244 F.3d at 1304. By contrast, in this case, as the panel majority explained in distinguishing *Piper*, the "claims of Daewoo America rely entirely on the alleged invalidity of the transactions approved by the Korean court." Pet. App. 17a.

Regardless of how they are denominated, Daewoo America's objections and claims are "inextricably intertwined" with the MTA and modified plan, Pet. App. 18a, and therefore the Korean proceedings afforded Daewoo America an opportunity to obtain complete relief. The injury Daewoo America claims is the termination of its distribution agreement and the transfer of Daewoo Korea assets (but not Daewoo America itself) to GMDAT as provided by the MTA. The Korean forum gave Daewoo America a full and fair opportunity to attempt to defeat the modified plan and MTA, which (if successful) would have averted any alleged injury and rendered any claim for damages unnecessary and meaningless. Daewoo America admits as much in its petition, asserting that an indemnity provision covering claims "arising from the 'consummation of any Transactions'" under the MTA and modified plan covers *all* of its damages claims, including claims "based on respondent's conduct in terminating petitioner's vehicle supply, the related collateral effects of that termination, and respondents' use of the assets acquired from [Daewoo Korea]." *See* Pet. 29 & n.12.[8]

As the panel majority held, Daewoo America's "complaint ... regarding the effect of the MTA should

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[8] Petitioner's argument relying on the indemnification provision is frivolous. Pet. 29 n.12; *id.* at 24 n.8. That the parties to a court-approved transaction may have planned in advance for a particular class of contingencies (which arguably includes a potential collateral attack, no matter how meritless and contrary to law), and allocated the risk of those contingencies (no matter how remote), does not and cannot mean that a challenge to the transaction is somehow lawful.

have been raised before the Korean Court," Pet. App. 16a, a point on which Judge Tjoflat agreed in his concurrence. Pet. App. 38a ("Daewoo America cannot attack the MTA without also attacking the [Korean] Bankruptcy court's approval of it; the two are inextricably intertwined"). Any disagreement on the panel did not implicate the legal standard to be applied, but only its application to the particular claims asserted by Daewoo America. *See id.*

Similarly, petitioner is simply wrong in its assertion that the Eleventh Circuit's decision is "in serious tension if not outright conflict with" *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985), which petitioner claims held that "res judicata cannot bar a federal antitrust claim that was not within the jurisdiction of the state court that adjudicated the plaintiff's other claims." Pet. 27. In fact, *Marrese* held the opposite: "a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts." 470 U.S. at 380-81; *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) (state court settlement had preclusive effect in federal court and barred even exclusively federal claims that plaintiffs could not have brought in the state court proceedings). Moreover, *Marrese* addressed the relationship of state and federal judgments in the federal system and the application of the Full, Faith and Credit Act, 28 U.S.C. § 1738. The question posed by that case — whether a prior state court's judgment extinguishes exclusively federal claims — has little bearing on whether the Eleventh Circuit properly abstained from deciding tort and other claims that Daewoo America itself argued arose not from any exclusively

federal right but were independently actionable under Korean law and could be brought in that country. In short, *Marrese* and like cases cited by petitioner (*see* Pet. 27-28) have nothing to do with comity in general or the comity issues raised in this case. *Cf. Banco Nacional de Cuba*, 376 U.S. at 415 n.17 (distinguishing a court's inquiry into the "validity of an act of an official of a foreign state under the law of that state" from a review among state courts; in the latter instance, there is "similarity of legal structure and an impartial arbiter, this Court, applying the full faith and credit provision of the Federal Constitution.").

* * *

However the Court resolves the two questions on which Daewoo America seeks certiorari, its claims were properly dismissed, independent of comity, under the panel's unanimous conclusion that Daewoo America's distribution agreement (which the court reviewed de novo) "is not reasonably susceptible to an interpretation that would give Daewoo America any rights in the vehicles manufactured by GMDAT and sold by Chevrolet and Suzuki." Pet. App. 13a; *see also id.* at 45a.

This conclusion bars all of Daewoo America's claims, including those that petitioner argues were independent of the asset sale approved by the Korean Court and "based on respondents' conduct in terminating petitioner's vehicle supply, the related collateral effects of that termination, and respondents' use of the assets acquired from [Daewoo Korea]." *See* Pet. 29. As Judge Tjoflat explained in his special concurrence, because the agreement did not guarantee Daewoo America a

"continuous supply of vehicles and parts, even after GM and its partners purchased the Daewoo Korea Plants," and did not "restrict Daewoo Korea's ability to sell" those assets, claims relating to the termination of the vehicle supply and subsequent use of the assets fail as a matter of law. Pet. App. 39-40a, 45a. The court's ruling on the interpretation of the contract likewise bars petitioner's fraud claim. Because Daewoo America had no right under the agreement to stop or object to Daewoo Korea's sale of its assets (outside of Daewoo America's right as a creditor to object during the reorganization proceedings — which it was free to exercise after it knew it would not be among the assets sold), it could not have been damaged, as Judge Tjoflat explained, by purportedly refraining to exercise any such right in reliance on GM's alleged assurances that it would be included in the contemplated transaction. Pet. App. 46a & n.26.[9]

Petitioner has not and cannot show that the Eleventh Circuit's decision was inconsistent with any federal authority, raises any important unsettled federal question, or that the Court's resolution of the questions presented will even affect the outcome of this case. Further review by this Court is unnecessary and unwarranted.

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[9] Given the panel's unanimous rejection of Daewoo America's interpretation of the distribution agreement that forms the foundation for its claims, there is no basis for Daewoo America's "hope" that it could overcome these alternative grounds on remand. *See* Pet. 10 n.4.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for *certiorari*.

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No. 06-926

In the Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION, and
GM DAEWOO AUTO & TECHNOLOGY CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As explained in the petition, and confirmed in the *amicus* brief of CMA Business Credit Services, this case raises significant and recurring issues of federal law on which the circuits are sharply divided. May the judge-made doctrine of international comity be used to close the doors of an American courthouse to claims that could not have been brought in the foreign proceeding (and have not been adjudicated *anywhere*)? May a foreign reorganization court's judgment be invoked by a non-debtor "as a shield" against claims asserted by another non-debtor based on conduct extrinsic to the bankruptcy proceeding, in direct conflict with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260 (1987)? And should these extraordinary expansions of the international comity doctrine be reviewed by appellate courts only for abuse of discretion, in conflict with the Second Circuit's decision in *Diorinou* v. *Mezitis*, 237 F.3d 133 (2001), even though many circuits – including the Eleventh Circuit itself – apply *de novo* review to res judicata rulings that involve prior *domestic* judgments?

Respondents' submissions sidestep these questions, principally by repackaging the court of appeals' rationale into a more defensible formulation. None of these efforts pays off, however, and further review of this extraordinary expansion of international comity is plainly warranted.

I. The Court Should Resolve The Conflict Over The Proper Standard Of Appellate Review

As we demonstrated in the petition (at 6-7, 13, 15-22), the panel majority applied the deferential abuse-of-discretion standard to the district court's blanket application of comity and dismissal of petitioner's claims. In so doing, the Eleventh Circuit parted company with the Second Circuit's well-reasoned decision in *Diorinou*, which had adopted and applied *de novo* review for comity rulings of the kind involved here. The Eleventh Circuit's holding improperly elevates the status of a

foreign judgment *above* that of a domestic judgment (because the latter's res judicata effect is reviewed *de novo* in the Eleventh and other circuits). It therefore violates the fundamental principle of parity. In adopting this standard of review, the panel offered no reason – other than a mistaken analogy to abstention cases – for affording such deference to the district court's application of claim-preclusive comity to a foreign judgment.

Respondents claim there is no conflict with *Diorinou* because the Second Circuit's opinion is "equivocal about the proper standard of review" and reaches only "tentative conclusion[s]." Suzuki Opp. 2, 15; accord GM Opp. 13 n.5. But Judge Newman's opinion could hardly be clearer. See Pet. 15-17. After exhaustively reviewing the relevant case law and identifying the "three different contexts" in which "United States courts have said that they are deferring to foreign proceedings or adjudications as a matter of 'comity'" (237 F.3d at 139), Judge Newman had this to say about the proper approach of appellate courts in reviewing (as in this case) the decision of "a domestic court * * * whether to accept the adjudication of a foreign tribunal on a cause of action or a particular issue" (*ibid.*):

> [W]e believe the standard is *de novo* review, * * * just as it would be on review of a judgment of a domestic court based on *res judicata* or collateral estoppel.

Id. at 140. Contrary to the suggestion of the Suzuki respondents, it is not possible to read equivocation or tentativeness into the simple declaratory statement, "we believe." See also *ibid.* (explaining that, "[i]n making that *de novo* review," the panel would examine the "further issue * * * as to the nature of the deference the trial court (and the appellate court in its *de novo* review) should accord to the foreign adjudication").

Equally baseless is respondents' suggestion that *Diorinou*'s holding was either dicta or has been ignored by later Second Circuit decisions. GM Opp. 12-13 & n.5 (largely, however, discussing pre-*Diorinou* cases); Suzuki Opp. 2, 13-14 & n.9, 16-17 (same). The Second Circuit's opinion clearly identifies "the

deference that a United States court * * * should accord to a judgment of another country" as the "principal issue" raised in the appeal – and resolves that issue after unambiguously both determining that *de novo* review is appropriate and applying that standard of review. After *Diorinou*, no district judge in the Second Circuit could possibly think that his or her comity rulings relating to the res judicata effect of a foreign judgment would be reviewed deferentially on appeal.

Nor are respondents correct in contending that "more recent * * * Second Circuit opinions" have disregarded *Diorinou*'s holding or applied an abuse-of-discretion standard of review in cases such as this. Suzuki Opp. 2; see also *id.* at 13-14, 17; GM Opp. 13. The only post-*Diorinou* decision cited by respondents for that proposition plainly involved an abstention-type use of the comity doctrine. See *JP Morgan Chase Bank* v. *Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 420, 422-23 (2d Cir. 2005) (reviewing comity-based decision to abstain in light of ongoing foreign proceeding); accord *Finanz AG Zurich* v. *Banco Economico S.A.*, 192 F.3d 240, 242, 246 (2d Cir. 1999) (identified in *Diorinou* as falling into the first category of abstention-type cases, see 237 F.3d at 139). If anything, the Second Circuit's recent cases involving abstention-type uses of comity have adopted a "more rigorous" standard than ordinary abuse-of-discretion review. See Pet. 17 n.5.[1]

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[1] In a further effort to muddy the waters, the Suzuki respondents suggest (at 12) that the Eleventh Circuit partially applied a *de novo* standard of review, pointing to the panel's statement that "[t]he interpretation of a contract is a question of law that the court reviews *de novo*." Pet. App. 10a. Accord GM Opp. 17. But the panel interpreted the Distribution Agreement in resolving the threshold question whether the Korean court's approval of the Modified Reorganization Plan had violated the automatic stay provision (Pet. App. 11a-13a), not in subsequently resolving the comity issue under the abuse-of-discretion standard (see *id.* at 16a-18a).

Unable to explain away the holding in *Diorinou*, respondents next argue that the decision below is *consistent* with *Diorinou* because this case falls into the first rather than the third category recognized by Judge Newman. GM Opp. 1, 13-14; Suzuki Opp. 2. According to the GM respondents, this is really an "abstention" case because the lower courts' comity rulings were predicated on the possibility that petitioner might pursue its claims in a Korean court *other than* the reorganization court. As explained above, this is pure revisionism. The district court dismissed petitioner's claims because it believed petitioner was seeking "to collaterally attack the entire Korean reorganization process and result." Pet. App. 70a; see also *id.* at 71a (granting "comity" to the Korean bankruptcy court's "proceedings and orders"); *id.* at 63a (making clear that it was "[a]nalyzing whether comity applies to a foreign *judgment*") (emphasis added). The court of appeals upheld the comity ruling on the same ground. *Id.* at 16a (stating that petitioner's claims are "a collateral attack on the order of the Korean court"); *ibid.* (stating that petitioner "cannot now collaterally attack" the reorganization court's "order"). Neither lower court faulted petitioner for failing to initiate a second litigation in Korea; they faulted petitioner for not bringing its claims in the Korean reorganization proceeding that had ended in a final judgment. And the fact that the district court dismissed petitioner's claims "with prejudice" and "entered judgment" (GM Opp. 6) confirms that the basis for the ruling was hardly abstention.

Next, respondents suggest that this case is a poor vehicle for resolving the circuit conflict because "there is no indication that *de novo* review would have led to a different result." Suzuki Opp.17; accord GM Opp. 16. But the court of appeals knew full well how to reserve rather than decide the standard-of-review issue, and it presumably would have done so if the resolution of that threshold issue could properly be avoided and was unnecessary to the outcome of the appeal. The best indication that the issue *did* matter to the outcome, of course, is the fact that it was addressed and resolved by the panel majority. Beyond that, as

Judge Tjoflat noted, it is difficult to see how the panel's cursory analysis could reflect anything other than a highly deferential abuse-of-discretion standard. Pet. App. 20a (noting that majority "expends little effort" in "analyzing the claims presented in the Amended Complaint"); *id.* at 47a ("it is patently clear" that the majority "rushed into * * * dismissing [petitioner's] Amended Complaint in its entirety"). Conversely, it is difficult to see how the district court's decision to accord res judicata effect to the Korean bankruptcy court's order could be upheld on *de novo* review given the uncontradicted expert testimony that petitioner's claims were outside that court's jurisdiction. See also *id.* at 19a-20a. As for respondents' speculation (Suzuki Opp. 18) that, following a reversal by this Court, the majority would join Judge Tjoflat's alternative rationale, we have already anticipated and addressed that issue. Pet. 10 n.4.[2]

Respondents make no serious effort to deny that the split between the Second and Eleventh Circuit is exacerbated by other circuits that have ruled that the standard of review turns on either the procedural setting of the lower court's ruling, the legal basis for the comity ruling, or both of those factors. See Pet. 19-20; see also CMA *Amicus* Br. 12-20 (explaining Eleventh Circuit's divergence from other circuits in standards applied to review of abstention decisions).[3] And respondents do not dispute that the Eleventh Circuit's use of an abuse-of-discretion

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[2] Respondents suggest (Suzuki Opp. 12 n.8) that petitioner did not clearly argue for a *de novo* standard of review below. Once again, they are mistaken. See Pet. C.A. Opening Br. 20-22 (urging *de novo* review and citing *Diorinou*); Pet. C.A. Reply Br. 1 n.1 ("As explained in our opening brief (at 20-22), the district court's order is reviewable *de novo*."); Reh'g Pet. 1, 9-11 (same).

[3] The Suzuki respondents do claim (at 15 n.10) that a Texas appellate court that expressly adopted the holding of *Diorinou* did so "with reservations." Not so. See *Velez* v. *Mitsak*, 89 S.W.3d 73, 79 (Tex. App. 2002) ("[W]e apply a *de novo* standard.").

standard marks a departure from the approach applied to res judicata rulings, and thus violates the fundamental principle of parity of treatment in the treatment of foreign and domestic judgments – a principle that (as the panel majority acknowledged) is embodied in the Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea. See Pet. 18; Pet. App. 15a. Although respondents deny that the standard-of-review issue is important and recurring, the many cases cited in their briefs serve only to confirm these characteristics. Further review and clarification of the standard-of-review issue is plainly needed.

II. Review Is Also Warranted To Resolve The Conflict Over The Scope Of The Comity Doctrine

As explained in the petition (at 22-30), the second question presented offers this Court a valuable opportunity to examine the Eleventh Circuit's unwarranted expansion of the comity doctrine as well as to bring greater uniformity to this important area of federal law. Specifically, the Court should address whether comity requires that an order approving a plan of reorganization for a foreign debtor in a foreign bankruptcy proceeding be given res judicata effect to bar the damages and other claims of a creditor (1) against parties *other* than the foreign debtor, where (2) such claims were not adjudicated – and could not even have been *raised* – in the foreign bankruptcy proceeding. In upholding this twofold expansion of the comity doctrine, the panel majority, with one judge disagreeing on this ground, extended comity far beyond its traditional boundaries, thereby creating a conflict with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260 (1987), and with this Court's decision in *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

Respondents offer three principal arguments against review of this second issue. First, they say that there is no conflict with *Remington Rand* or *Marrese*. GM Opp. 1-2, 21-26; Suzuki Opp. 21-23, 27. According to respondents, the relevant portion of the

Third Circuit's opinion in *Remington Rand* – Section IV.C, see 830 F.2d at 1267 – was limited or qualified in significant ways by the court's "separate discussion" of other issues in previous sections of the opinion. GM Opp. 22. But the relevant passage in *Remington Rand* contains no trace of such limitation:

> BSI argues that the bankruptcy and district courts improperly entertained Remington U.S.'s claim, because Remington B.V.'s Dutch bankruptcy proceedings were entitled to comity. *This contention is without merit.* Remington U.S.'s claim was against BSI, not Remington B.V. The rationale for granting comity in such a situation would be to allow a foreign debtor's assets to be distributed equitably. *See Cunard S.S. Co. v. Salen Reefer Svcs.*, 773 F.2d 452, 457-58 (2d Cir.1985). Remington B.V.'s bankruptcy, however, *cannot be used as a shield by BSI.*

830 F.2d at 1267 (emphasis added). Of course, if the Third Circuit's decision had really turned on the facts that "the complained-of transaction * * * was not approved by the foreign court" and Remington U.S. "had no notice or opportunity to object" (GM Opp. 22), there would have been no reason for the Third Circuit to include Section IV.C. in its opinion; the court could have (and would) have stopped after Section IV.B. But the Third Circuit did not stop there for a good reason: it wished to address (and reject) all of the "several ways" that BSI was "invok[ing] the concept of international comity," 830 F.2d at 1266, including not only the specific attacks on "the Dutch court's order" (*ibid.*) but also BSI's independent argument based on the special nature of (and need to accord comity towards) the entire "Dutch bankruptcy proceedings." *Id.* at 1267. See also CMA *Amicus* Br. 7-8, 10.

Equally unsuccessful are respondents' efforts to explain away the conflict with *Marrese*. As we showed (Pet. 27-29), this Court's decision in *Marrese* turns on the bedrock res judicata principle that a previous proceeding cannot be used as a bar to claims that could not have been adjudicated there. See RESTATE-

MENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982). According to respondents, the Eleventh Circuit's opinion is faithful to that principle because it rests on the determination that all of petitioner's claims against the respondents *could have been raised* before the Korean bankruptcy proceeding. Suzuki Opp. 2-3, 27-28. In fact, the panel majority merely *assumed* (ignoring unrebutted expert evidence of Korean law to the contrary, see Pet. 7 n.3; CMA *Amicus* Br. 9-10) that all of petitioner's claims could have been raised in the Korean bankruptcy proceeding, based solely on the panel's view that those claims "arise out of the same nucleus of operative facts considered by the Korean court" and somehow "relate to" the "approval of the Modified Reorganization Plan and the MTA." Pet. App. 16a, 17a. That analysis reflects an abandonment – not an application – of the principle underlying *Marrese*. See Pet. 27-29; CMA *Amicus* Br. 8-10; *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("If 'relate to' were taken to extend to the fullest stretch of its indeterminacy, then for all practical purposes [ERISA] preemption would never run its course, for [r]eally, universally, relations stop nowhere[.]") (internal quotations omitted).[4] The Eleventh Circuit *never* found that all of petitioner's claims against respondents for damages for fraud and the like could have been adjudicated by the Korean reorganization court.

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[4] The GM respondents quibble (at 25) that *Marrese* "addressed the relationship of state and federal judgments in a federal system" under 28 U.S.C. § 1738, whereas this case involves a foreign judgment and its res judicata effect, under a treaty requiring Korean judgments to be treated the same as a "sister state judgment" (Pet. App. 15a), on state-law claims asserted in a federal court. Those distinctions in no way undermine the fundamental res judicata principle applied in *Marrese* – and ignored by the Eleventh Circuit in this case. Nor are the GM respondents correct in suggesting that *Marrese* has "nothing to do with comity." GM Opp. 26. See 470 U.S. at 380 ("Section 1738 embodies concerns of comity[.]").

Second, respondents argue that the Eleventh Circuit's novel expansion of the comity doctrine is consistent with various cases holding that "fraud and other tort claims attacking or arising out of a court-ordered asset transfer * * * are barred as improper attacks on the sale proceedings." GM Opp. 17-18 (citing, *e.g.*, *Gekas* v. *Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012 (7th Cir. 1988)). But most of these cases – which the Eleventh Circuit neither cited nor relied on – are readily distinguishable because they involve suits by *a trustee or debtor* against a purchaser for alleged misconduct in connection with a court-approved bankruptcy sale – misconduct that allegedly affected the integrity of the bidding process itself and the ability of the estate to receive the best price possible. Unlike the claims of a non-debtor (such as petitioner) against other non-debtors (such as respondents), claims of this kind involve misconduct *in the bankruptcy sale process* that depresses the price received by the estate – conduct that falls squarely within the bankruptcy court's jurisdiction. These cases might preclude a suit by DWMC – the debtor that sold the assets – or its trustee against GM, but they have nothing to do with fraud claims by a party other than the debtor or the trustee against other third parties.[5]

Third, respondents attempt to defend the merits of the decision below. The GM respondents suggest that "all of [petitioner's] claims" are barred by virtue of the panel majority's conclusion that the Distribution Agreement does not give petitioner "'any rights in the vehicles manufactured by GMDAT and sold by Chevrolet and Suzuki.'" GM Opp. 26 (quoting Pet.

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[5] The few cases cited by GM that *do* involve suits by third parties against a purchaser of property of the estate, *e.g.*, *Regions Bank* v. *J.R. Oil Co., LLC*, 387 F.3d 721, 725, 728-32 (8th Cir. 2004), are also easily distinguishable because they involve (1) claims of a direct interest in the property transferred, and (2) court orders that expressly provide for sales that are "free and clear" of all encumbrances or claims – language that does not appear in the Korean reorganization court's order.

App. 13a). But that is doubly mistaken, because the panel did not rely on that rationale as the basis for its comity ruling (as opposed to its separate ruling regarding the automatic stay) and, in any event, as Judge Tjoflat correctly noted, "most of [petitioner's] claims *solely* concern the [respondents'] dealings with [petitioner], *separate and distinct from* the transfer of [DWMC's] manufacturing assets to GM and its partners." Pet. App. 19a (emphasis added). See Pet. 9-10, 26-27. Thus, petitioner sought damages on thirteen out of fourteen claims, and "[a]warding Daewoo America damages pursuant to its claims * * * would *do nothing to disturb* GM's ownership interest in GMDAT, nor would it affect GMDAT's continued control of the Daewoo Korea Plants and other assets." Pet. App. 27a n.8 (emphasis added). And petitioner's successor liability claim was "directed at GMDAT, not [DWMC]," and was if anything "simply seeking to *enforce* the bankruptcy court's order." *Id.* at 33a (emphasis added). Had the panel majority applied something other than a highly deferential standard of review, it no doubt would have concluded – as did Judge Tjoflat – that most of petitioner's claims clearly were *not* barred by the doctrine of international comity.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] Unfortunately, space does not allow us to correct the many distortions of the record contained in respondents' briefs, including GM's positively Kafkaesque assertion (at 4) that petitioners really "benefited" from GM's fraud and from the MTA by "becoming U.S. warranty administrator" for the discontinued line of Daewoo-branded vehicles, or GM's false suggestion (at 23) that petitioner "could have obtained complete relief" by defeating the plan that the Korean reorganization court approved. By the time of the Korean court's approval, petitioner had already been crippled by respondents' fraudulent and tortious conduct. See Pet. 2-5.

Respectfully submitted.

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No. 06-926

IN THE

Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,
Petitioner,

v.

GENERAL MOTORS CORP., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* CMA BUSINESS CREDIT SERVICES IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE

Credit Managers Association ("CMA"), which does business as CMA Business Credit Services, hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Consent to the filing of this brief has been obtained from counsel for the petitioners. Counsel for respondents have not consented.

With over 2,000 member companies across a broad range of industries, CMA is a California nonprofit corporation that provides a full array of business insolvency services. Among other services, CMA is frequently designated by bankruptcy courts to serve as secretary to the official creditors' committee in reorganization cases. In liquidation cases, CMA often accepts a general assignment for the benefit of creditors from the debtor.

In petitioner Daewoo Motor America, Inc.'s ("Daewoo America") Chapter 11 proceeding, CMA was appointed Trustee of the Creditor Trust at the suggestion of petitioner and with the endorsement of the Official Unsecured Creditor's Committee. CMA holds 95% of the stock of petitioner in trust for, and for the benefit of, the thousands of consumers and small businesses holding unsecured claims against the petitioner. Taken together, these creditors have filed claims for more than $840 million (with an allowed value of $519 million). As a result of the Eleventh Circuit's decision in this case, those claims have very little value.

More generally, in light of the growing internationalization of business, CMA increasingly faces issues concerning the effect of foreign proceedings on a domestic bankruptcy. Accordingly, CMA's interest in resolving the issues of international comity raised by this case extend beyond the effect of the decision below on the creditors of Daewoo America. With questions of comity

becoming ever more common, particularly in the international bankruptcy context, the ill effects of the Eleventh Circuit's analysis will be widely felt, including by CMA's members, the creditors it represents in this case, and other creditors that it will represent in future cases.

CMA, its members, and the creditors it represents have a strong interest in the outcome of this case because the decision of the Eleventh Circuit expanded the doctrine of international comity beyond all sensible limits. In doing so, the Eleventh Circuit ignored both the limits on comity established by other circuits and the guidance of this Court.

CMA's *amicus* filing focuses primarily on matters not addressed to any significant extent by petitioner. In particular, the majority of the argument (all of Section II) explains that the court of appeals' erroneous decision to apply "abuse of discretion" rather than *de novo* review to the district court's decision precluding petitioner's fraud claims results from a line of Eleventh Circuit decisions that have inappropriately transformed international *res judicata* cases into abstention cases. This Court's review is needed to bring the Eleventh Circuit's jurisprudence into line with that of this Court and other circuits.

CMA also argues that the Eleventh Circuit's opinion squarely conflicts with the Third Circuit's decision in *Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987). Specifically, the Eleventh Circuit (unlike the Third Circuit) applies the doctrine of comity to preclude claims brought against entities *other* than the foreign debtor that could *not* have been presented in the foreign proceeding. The decision below is also inconsistent with this Court's decision in *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), because the Eleventh Circuit precluded petitioner's claims based on the

plan approval order of a Korean reorganization court – which has no jurisdiction to hear such claims – even though other Korean courts would not have given it preclusive effect. Furthermore, the Eleventh Circuit ignored this Court's guidance in *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), requiring that the rights of American citizens such as the creditors represented by CMA be weighed against the overly expansive application of foreign judgments.

In short, *amicus* has grave concerns about the implications of the lower court decision, and a great interest in securing expeditious review of the questions presented. The motion for leave to file the attached brief should be granted, and the Court should review and reverse the lower court decision.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a district court's dismissal of a lawsuit, under the doctrine of international comity and based on the preclusive effect of a foreign judgment, is reviewable *de novo* or only for abuse of discretion.

2. Whether the doctrine of international comity may be invoked, based on a prior order of a foreign bankruptcy court approving a plan of reorganization for a foreign debtor, to bar a lawsuit in U.S. courts, where the precluded claims are asserted against parties *other* than the foreign debtor and could not have been brought in the foreign proceeding.

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INTEREST OF AMICUS CURIAE[1]

Credit Managers Association ("CMA"), which does business as CMA Business Credit Services, is a California nonprofit corporation providing business insolvency services. CMA was founded in 1883 and has approximately 2,100 member companies representing a broad spectrum of industries. Among the many services it provides, CMA is frequently authorized by bankruptcy courts to serve as secretary to the official creditors' committee in reorganization cases. In liquidation cases, CMA often accepts a general assignment for the benefit of creditors from the debtor.

In this case, CMA was appointed Trustee of the Creditor Trust at the suggestion of petitioner and with the endorsement of the Official Unsecured Creditor's Committee. CMA holds 95% of the stock of petitioner in trust for, and for the benefit of, the thousands of holders of unsecured claims in petitioner's Chapter 11 proceeding. More generally, as a result of the growing internationalization of business, CMA, the creditors it represents, and its member companies increasingly face situations where issues arise concerning the effect of foreign proceedings on a domestic bankruptcy or on U.S. creditors. Accordingly, CMA has a strong interest in the outcome of this case.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the named *amicus curiae* and its counsel, contributed monetarily to the preparation or submission of this brief.

PRELIMINARY STATEMENT

The petition for a writ of certiorari filed by Daewoo Motor America, Inc. ("Daewoo America") presents issues of fundamental significance to American businesses. The Eleventh Circuit expanded the doctrine of international comity beyond sensible limits by barring hundreds of millions of dollars of claims against respondents on the basis of a Korean reorganization court's order approving a plan of reorganization for a debtor that is not a party to this litigation.

The Eleventh Circuit held that fraud claims asserted against respondents are precluded by the Korean reorganization court's plan approval order even though respondents were not debtors in the Korean proceeding and even though Korean civil courts would not have barred petitioner's fraud claims on the basis of the Korean reorganization court's order. In reaching that result, the Eleventh Circuit ignored both the limits on comity established by other circuits and the guidance of this Court, including the requirement that the rights of American citizens such as the creditors represented by CMA be weighed against the overly expansive application of foreign judgments. *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (requiring "due regard" for the "rights of [United States] citizens" in the application of international comity). The Eleventh Circuit also erroneously reviewed the district court's decision under the abuse of discretion standard when *de novo* review is warranted.

At stake here are thousands of claims by the creditors of Daewoo America, including those of hundreds of consumers and small businesses. Daewoo America's core claim is that, while respondent General Motors Corporation ("GM") was negotiating to acquire the assets of Daewoo Motor Co., Ltd. ("Daewoo Korea"), GM misled Daewoo America.

Specifically, Daewoo America alleges that GM repeatedly assured Daewoo America that it would be included in the GM acquisition and would continue to be the exclusive distributor of Daewoo vehicles in the United States after the acquisition. Daewoo America further alleges that, relying on those assurances, it continued to invest in its distributor operations and incur liabilities to dealers. Thereafter, GM excluded Daewoo America from its agreement with the Daewoo Korea Receiver. Daewoo America's supply of vehicles was terminated, its distribution business was ruined, and it ultimately filed for bankruptcy relief under Chapter 11.

After Daewoo America's bankruptcy filing, its creditors filed claims for more than $840 million, and the value of the allowed claims is approximately $519 million. The largest group of allowed claims, for approximately $270 million, is from former Daewoo dealers. Consumers filed nearly 3,000 allowed claims for approximately $21 million. Other businesses both large and small filed hundreds more claims. *See* Daewoo Motor America, Inc. Claims Analysis, Exhibit 7 to DMA's Sixth Amended Chapter 11 Plan of Reorganization, dated July 24, 2003, Case No. LA 02-24411-BB (Bankr. C.D. Cal.). As a result of the Eleventh Circuit's decision in this case, those claims have very little value.

Beyond the effect of the decision below on the creditors of Daewoo America, issues involving international comity are growing exponentially in importance. Of the more than 1,300 references to international comity in the federal and state court decisions of this country, nearly half (over 600) are from the last ten years. Indeed, it is widely reported that issues relating to the preclusive effect of foreign judgments arise "increasingly often today as a result of an unprecedented expansion of transnational economic activities and a resulting increase in international business disputes." M. Trevino de Coale, *Stay, Dismiss, Enjoin, or Abstain: A*

Survey of Foreign Parallel Litigation in the Federal Courts of the United States, 17 B.U. Int'l L.J. 79, 80 (1999).

The Eleventh Circuit's decision gives foreign judgments greater preclusive effect than American judgments. That would make no sense even if international comity issues arose only infrequently. But with questions of comity becoming ever more common, the ill effects of the Eleventh Circuit's analysis will be widely felt.

SUMMARY OF THE ARGUMENT

The decision below barred hundreds of millions of dollars of claims against respondents by giving unwarranted preclusive effect to the plan approval order of a Korean reorganization court. The Eleventh Circuit's erroneous decision conflicts with decisions of this Court and other courts of appeals.

I. The decision below expanded the doctrine of comity to allow preclusion of claims that could *not* have been presented in the foreign proceeding and are brought against entities *other* than the foreign debtor. That approach flatly conflicts with the Third Circuit's decision in *Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987). In that case, the Third Circuit correctly held that non-debtors in a foreign proceeding cannot use a foreign judgment "as a shield" because that would not advance the purposes of either bankruptcy law or the doctrine of comity.

The Eleventh Circuit's decision is also inconsistent with this Court's decision in *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985). The Court held in *Marrese* that a federal court may not give preclusive effect to a state court judgment where a state court would not do so, and there is no good reason to give greater preclusive effect to a foreign court judgment. Moreover, the foreign court lacked jurisdiction over the claims the Eleventh Circuit has

held to be precluded, and its judgment should not be given preclusive effect in that circumstance.

The Eleventh Circuit failed to follow the guidance of this Court in *Hilton v. Guyot*, 159 U.S. at 164, which requires "due regard" for the rights of United States citizens in the application of international comity. Thousands of Daewoo America creditors filed hundreds of millions of dollars in claims for losses resulting from respondents' wrongdoing. As required by *Hilton*, the lower court should not have extinguished those claims based on a foreign court judgment without evaluating the equities – particularly where the foreign court could not and did not adjudicate such claims.

II. This Court should also review the Eleventh Circuit's decision to apply the abuse of discretion standard. The court below declined to review the district court's decision *de novo* because it concluded that this case involves abstention issues. Pet. App. 10a. But it does not. The issue here is not whether it makes sense to refrain from interfering with an ongoing proceeding elsewhere, but whether to give preclusive effect to a judgment already issued. That makes this a *res judicata* case rather than an abstention case – and *de novo* review is warranted in *res judicata* cases. The court of appeals' erroneous decision follows from a line of Eleventh Circuit decisions that have inappropriately transformed international *res judicata* cases into abstention cases. This Court's review is needed to bring the Eleventh Circuit's jurisprudence into line with that of this Court and other circuits.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S INTERNATIONAL COMITY RULING UNREASONABLY EXPANDS THAT DOCTRINE.

The Eleventh Circuit barred claims against entities other than the debtor in the Korean reorganization proceeding. It

did so even though a Korean court would not bar those claims, and without adequately considering the interests of American citizens. Its decision is contrary to decisions of this Court and courts of appeals.

A. The Decision Below Conflicts With *Remington Rand* Because Respondents Were Not Debtors In The Korean Reorganization Proceeding.

Daewoo America seeks damages from respondents for misrepresenting that Daewoo America would continue to be the exclusive American distributor for Daewoo vehicles after GM's acquisition of Daewoo Korea. Petitioner argued below that comity should not bar this claim because it does "not involve the same cause of action and the same parties" as the foreign reorganization proceeding. Pet'r C.A. Br. at 51. Daewoo America added that "not even a Korean civil court would preclude DMA from suing the Defendants." Pet'r C.A. Reply Br. at 14 (citation omitted). Moreover, petitioner explained that it would be inconsistent with the purposes of both bankruptcy law and the doctrine of comity to allow a foreign judgment to be "used as a shield by the non-debtor Appellees." *Id.* at 12.

The Eleventh Circuit did not meet these arguments head on. It did not dispute that petitioner's fraud claim against non-debtor parties was not presented to and could not have been adjudicated by the Korean court. Nor did it conclude that respondents were debtors in the Korean reorganization proceedings. Rather, the court invented an unprecedented legal impediment to petitioner's claims. Specifically, the Eleventh Circuit held that comity bars petitioner's claims because they are "intertwined with the order of the Korean

court" and "arise out of the same nucleus of operative facts considered by the Korean court." Pet. App. 16a.[2]

The lower court thus held that *it does not matter* that petitioner's claims were not (and could not have been) heard by the Korean court or that respondents were not debtors in that action. This new approach to questions of comity represents a dangerous split from sounder precedents in other circuits and from this Court's jurisprudence.

In *Remington Rand*, the Third Circuit held that non-debtors in a foreign insolvency proceeding could *not* use the foreign judgment "as a shield." The court explained that the rationale for precluding claims against a foreign debtor – "to allow a foreign debtor's assets to be distributed equitably," 830 F.2d at 1267 – is simply inapplicable to entities other than the foreign debtor. *See also JP Morgan Chase Bank v. Altos Hornos De Mexico*, 412 F.3d 418, 424 (2d Cir. 2005) (American courts defer to foreign bankruptcy proceedings because "the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding") (citation omitted). The decision below conflicts with that decision, and the Third Circuit's approach is the sounder one.

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[2] Respondents Suzuki Motor Corporation and American Suzuki Motor Corporation ("Suzuki Respondents") creatively interpret this section of the Eleventh Circuit's opinion as holding that petitioner *could* (and should) have presented all of its claims to the Korean bankruptcy court. *See, e.g.*, Resp. Br. at 24-25. But the Eleventh Circuit said no such thing, and the Korean court would not have had jurisdiction to consider petitioner's tort claims. *See* below at pp. 9-10.

The Suzuki Respondents (*see* Resp. Br. at 19-21) seek to harmonize the decision below with *Remington Rand* by emphasizing the Eleventh Circuit's view (*see* Pet. App. 16a, 17a) that petitioner's request for injunctive relief on some claims would have required that the "'transfer [of assets under the MTA and Modified Reorganization Plan approved by the Korean court] be set aside.'" As Judge Tjoflat pointed out, however, petitioner also sought damages on thirteen of its fourteen claims. Pet. App. 27a n.8. Judge Tjoflat accordingly understood that "[f]or the vast majority of Daewoo America's claims, the proceedings before the Korean bankruptcy court serve as little more than a factual backdrop." *Id.* at 19a. Plainly, a monetary award *against GM* would not have any effect on the "orderly distribution" of the Daewoo Korea assets addressed by the Korean court. And equally plainly, even if it were proper to allow the Korean judgment to bar any claims that *would* have interfered with the Korean court's decision, it makes no sense to allow that decision to be invoked against claims for damages that would have no such effect.

In short, in contrast to *Remington Rand*, the rule adopted by the Eleventh Circuit allows non-debtor third parties to rely on foreign judgments to bar claims that do not undercut a foreign bankruptcy decision. That unwarranted expansion of international comity severely prejudices the rights of the creditors that CMA represents here and others it will represent in future transnational bankruptcy proceedings.

B. The Decision Below Is Contrary To *Marrese* Because Korean Courts Would Not Bar Petitioner's Claim.

The Eleventh Circuit's view that it does not matter whether Daewoo America's claims were presented to the Korean Court so long as they relate to the "operative facts" at

issue there is inconsistent with this Court's decision in *Marrese*. This Court held that a federal court may not give preclusive effect to a state court judgment where a state court would not do so. The Court pointed out that claim preclusion obviously should not apply when a plaintiff could not have "rel[ied] on a certain theory of the case or . . . [sought] a certain remedy because of the limitations on the subject matter jurisdiction of the courts.'" 470 U.S. at 382. The Court concluded that under the relevant federal statute, 28 U.S.C. § 1738,[3] a federal court may not "give greater preclusive effect to a state court judgment than would the judgment-rendering state." *Id.* at 384.

The same principle should apply here: A Korean court's decision plainly should not be given *more* preclusive effect by a federal court than the decision of the court of a state within our federal system.[4] Yet that is precisely what happened below – the Eleventh Circuit precluded claims that the Korean civil courts would have allowed to go forward. In the lower courts, Daewoo America presented a declaration from a Korean legal expert explaining that Korean reorganization courts do not have jurisdiction over general civil claims or claims against the debtor arising after the

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[3] Section 1738 provides that "judicial proceedings ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[4] Under the Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, "a Korean judgment is elevated to the status of a sister state judgment." Pet. App. 15a.

commencement of bankruptcy proceedings. *See* Exhibit 1 to Pet'r 11th Cir. Br. at ¶ 16. The Korean reorganization court therefore "made no ruling" with respect to Daewoo America's claims against respondents. *Id.*, ¶ 20. As a result, "not even a Korean civil court would preclude DMA [Daewoo America] from suing the Defendants based on doctrines of comity, res judicata, or collateral estoppel." *Id.*

GM's expert below did not refute this opinion. He did not claim that the Korean reorganization court had jurisdiction to adjudicate petitioner's fraud claims, or that it would have done so. Rather, in his affidavit GM's expert indicated only that Daewoo America's tort claims are "properly heard, if at all, in a Korean Court." Sang-Hyun Song 11th Cir. Aff. ¶ 14. In fact, however, under *Marrese*, if the Korean courts would not preclude Daewoo America's claims – and they would not – then those claims should be allowed to proceed in United States district court as well.

The Suzuki Respondents argue that there is no conflict with *Marrese* here because petitioner purportedly "*could* have brought its claims in the Korean [reorganization] proceeding." Resp. Br. 27. However, the Eleventh Circuit did not say that – instead it held, contrary to the Third Circuit's decision in *Remington Rand*, that even a non-debtor third party may invoke a foreign judgment to preclude *any* claim arising from the same "operative facts" as the foreign judgment. The Eleventh Circuit found a commonality of "operative facts" sufficient to give the Korean reorganization court's plan approval order preclusive effect with respect to Daewoo America's claims against GM *regardless* of whether that court had jurisdiction over the claims and *regardless* of whether a Korean civil court would have accorded that judgment such claims preclusive effect – matters as to which the Eleventh Circuit made no findings. That rule conflicts not only with *Remington Rand*, but with *Marrese* as well.

C. The Decision Below Failed To Adequately Consider The Interests Of American Citizens.

The Eleventh Circuit recited the long-established rule that a court applying the doctrine of international comity should consider "the rights of its own citizens." *Hilton v. Guyot*, 159 U.S. at 164; *see* Pet. App. 13a. But the court failed to observe the rule. Instead, the Eleventh Circuit held only that "Daewoo America has not identified any 'public policy notion[] of what is decent and just' that is offended by the application of comity to the Korean bankruptcy order." Pet. App. 15a. The Eleventh Circuit thereby effectively substituted its own vague public policy inquiry, *see, e.g., Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2006), for the weighing of citizens' rights required by the *Hilton* case.

In fact, the rights of American citizens affected by the lower court's comity decision are substantial. The thousands of Daewoo America creditors who filed claims in this proceeding have an enormous stake in the outcome here. Those creditors, including hundreds of consumers and small businesses, have filed half a billion dollars in claims. Yet the courts below failed even to mention their interests of in performing the comity analysis.

The severe prejudice to those creditors of expanding the doctrine of comity to block their claims is obvious. As alleged by Daewoo America, respondent's misrepresentations caused it and its dealers to continue to invest large sums in the expectation of a continuing U.S. distributorship – money that was lost when GM reneged on its representations. In contrast, the only possible consequence of allowing petitioner's claims to go forward is that respondents might be called upon to redress the harm that they caused. These claims by one non-debtor in the

Korean re[illegible]nization proceeding against other non-debtors in that p[illegible]eding are of no concern to the Korean reorganization court. As required by *Hilton*, the lower court should have at least evaluated these equities.

The doctrine of international comity "has never been well-defined, leading one scholar to pronounce it 'an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.'" *JP Morgan Chase Bank*, 412 F.3d at 423 (quoting Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 281 (1982)). This Court's guidance is sorely needed to correct the Eleventh Circuit's expansion of the doctrine, which unreasonably harms American citizens.

II. PRINCIPLES OF *RES JUDICATA* RATHER THAN ABSTENTION GOVERN THIS CASE AND DICTATE *DE NOVO* REVIEW.

The Eleventh Circuit incorrectly held that "the principle of international comity applied in this case is an abstention doctrine" subject to "abuse of discretion" review. Pet. App. 10a. That decision is inconsistent with the Second Circuit's decision in *Diorninou v. Mezitis*, 237 F.3d 133 (2d Cir. 2001), and also is manifestly incorrect. First, principles of *res judicata*, not abstention, govern this case and dictate *de novo* review. Second, even if abstention analysis were applicable here, *de novo* review would apply to the district court's decision because it rests on a legal determination. This Court should grant certiorari to ensure that applications of international comity respect that fundamental rule.

A. The District Court's Comity Holding Involved The Application Of *Res Judicata* Principles.

The district court invoked international comity to determine the preclusive effect of an order already entered by

the Korean reorganization tribunal, not to avoid interfering with ongoing foreign proceedings. The decision was thus akin to a determination of *res judicata* rather than to abstention.

A brief review of this Court's abstention jurisprudence underscores the difference. Abstention is a narrow exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). This Court's precedents establish five widely recognized forms of abstention. None of them resembles the action taken by the district court in this case.

The first three variations on abstention permit a federal court to stay its hand when important questions of unclear state law would be better resolved by concurrent or future state proceedings. First, *Pullman* abstention allows a federal court to abstain when a state court's clarification of uncertain state law in a pendant claim would permit the federal court to avoid a constitutional question. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941). Second, in diversity cases, a federal court may exercise *Thibodaux* abstention where an important issue of state law intimately involved with the State's sovereign prerogatives remains unclear. *La. Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 30-31 (1959). Third, *Burford* abstention allows a federal court to abstain where state law is unclear and there is a need to defer to complex state administrative procedures. *Burford v. Sun Oil Co.*, 319 U.S. 315, 333-34 (1943). In all of these circumstances, however, once the state tribunal has resolved the state-law issue or issues, there is no further basis for abstention. In other words, the justification for abstention resides in the availability of a *forthcoming* state court clarification of state law.

The fourth form of abstention – *Younger* abstention – differs from the previous three in that it *requires* (rather than permits) federal courts to abstain from interfering in ongoing state enforcement proceedings through the issuance of an injunction or declaratory relief.[5] *See Younger v. Harris*, 401 U.S. 37 (1971) (abstaining from enjoining pending criminal proceeding). Once again, however, the justification for abstention is the *ongoing* state action. *See Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (The "principles of equity, comity, and federalism" that compel *Younger* abstention lack "force in the absence of a pending state proceeding.") (citation omitted).

Fifth, and finally, the Court articulated a narrow basis for abstention in *Colorado River*, under which a federal court may sometimes abstain because of duplicative litigation in state court. More specifically, in rare cases the interests of "wise judicial administration" and a "comprehensive disposition of the litigation" may outweigh the duty to exercise jurisdiction. *Id.* at 817 (citation omitted). Again, however, the basis for *Colorado River* abstention lies in the existence of ongoing duplicative proceedings in state court.

As this brief review shows, abstention is fundamentally a forward-looking concept. Central to the doctrine is the principle that concurrent state proceedings may, in the future, best resolve certain issues properly before a federal court.

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[5] Because the district court "*must* dismiss the federal action" when "a case falls within the proscription of *Younger*," there is broad agreement among the courts of appeals that *Younger* abstention determinations are reviewed *de novo*. *See, e.g., World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081-82 (9th Cir. 1987).

And deciding whether a future state determination would, in fact, resolve issues in a manner preferable to federal court adjudication of those issues necessarily calls for the exercise of judgment or discretion on the part of the district court. Such an exercise of judgment is, of course, appropriately reviewed under an abuse of discretion standard.

In contrast, where a state court judgment has already been entered, the concerns of abstention must give way to the backward-looking principles of *res judicata*. Stated most simply, *res judicata* comprises rules precluding a court from hearing a matter that another court has already resolved. Because the question what has been resolved is a legal one, district court decisions applying *res judicata* principles should be reviewed *de novo*. *See, e.g., Bates v. Township of Van Buren*, 459 F.3d 731, 734 (6th Cir. 2006).

This same distinction between the forward-looking, discretionary exercise required in abstention cases and the backward-looking, legal one involved in *res judicata* situations exists in the context of international comity determinations. Where concurrent foreign proceedings are ongoing, a federal district court may be called upon to make a discretionary determination regarding which suit may best resolve specific issues.[6] But where a foreign tribunal has

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[6] Indeed, as cited by the Suzuki Respondents, *see* Resp. Br. at 14 & n.9, appellate courts have reviewed comity decisions involving *pending* foreign bankruptcy proceedings for abuse of discretion. *See, e.g., JP Morgan Chase Bank*, 412 F.3d at 422 (reviewing lower court's decision to apply comity in light of a "pending foreign bankruptcy proceeding"); *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 242 (2d Cir. 1999) (reviewing extension of comity to on-going Brazilian liquidation proceedings); *Jota v. Texaco Inc.*, 157

already entered judgment, the U.S. court must primarily determine – through the application of *res judicata* principles – which matters have been "judged" so as to preclude relitigation. That is a legal question that should be subject to *de novo* review.[7]

This case plainly involves the latter kind of determination. The district court was called upon to determine as a matter of law whether the Korean court would even have had jurisdiction to decide the issues presented by Daewoo America in federal court. If the Korean court could not have ruled on those issues even had they been raised before it, then its decision should not be given preclusive effect. Because that was a legal question to be decided under

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F.3d 153, 159 (2d Cir. 1998) (reviewing extension of comity to pending proceedings in Ecuador); *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 856 (2d Cir. 1997) (reviewing denial on grounds of comity of motion to stay U.S. proceedings in deference to pending foreign proceedings); *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993) (reviewing extension of comity to pending Australian liquidation proceedings); *Cunard S.S.Co. v. Saleen Reefer Servs.*, 773 F.2d 452, 460 (2d Cir. 1985) (reviewing decision to grant comity to pending Swedish bankruptcy proceedings).

[7] In previous cases, the Eleventh Circuit has referred to the backward-looking analysis as "retrospective comity" rather than preclusion or *res judicata*. *See Ungaro-Benages*, 379 F.3d at 1238-39. But changing the name does not affect the legal nature of the determination made, and should not affect the standard of review.

res judicata principles, the court of appeals erred by declining to review the district court's decision *de novo*.

B. *De Novo* Review Would Apply Here Even If The Case Involved "Abstention."

As discussed above, the Eleventh Circuit's determination that this case involves "an abstention doctrine" is simply incorrect. It bears emphasis, however, that even were this properly viewed as an abstention case, the Eleventh Circuit's decision to review the trial court's ruling only for abuse of discretion would still be both wrong and inconsistent with the decisions of other circuits in the only abstention cases – *Colorado River* cases – even arguably analogous here.

As set forth above, *Pullman, Burford, Thibodaux*, and *Younger* abstention all relate "to considerations of proper constitutional adjudication and regard for federal-state relations." *Colorado River*, 424 U.S. at 817. The abuse of discretion standard is appropriate for review of such determinations.[8] This case does not involve constitutional adjudication or federalism. However, *Colorado River* abstention involves "considerations of '[wise] judicial administration, giving regard to conservation of judicial

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[8] The only case cited by the court below on the question of standard of review involved *Burford* abstention. *See Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260 (11th Cir. 2000). In the majority of the circuits, lower court applications of *Burford* abstention are, indeed, subject to review for abuse of discretion. *See, e.g., First Penn-Pacific Life Ins. Co. v. William R. Evans, Chtd.*, 304 F.3d 345, 348 (4th Cir. 2002). *But see Superior Beverage Co. v. Schieffelin & Co.*, 448 F.3d 910, 913 (6th Cir. 2006) (reviewing *de novo*).

resources and comprehensive disposition of litigation.'" *Id.* (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)).

While this case is not an abstention case at all, the Eleventh Circuit presumably believed that it implicates "considerations of wise judicial administration" and "conservation of judicial resources." Indeed, the Eleventh Circuit has previously relied on *Colorado River* abstention principles in addressing the question whether to follow a foreign judgment. *See Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994). In *Turner*, the court found it "helpful" to "take[] the criteria enunciated in *Colorado River* and appl[y] them to the international context." *Id.* Subsequently, in *Ungaro-Benages*, 379 F.3d at 1237, the Eleventh Circuit cited this aspect of *Turner* for the proposition that "[i]nternational comity . . . is an abstention doctrine." The decision below in turn cited *Ungaro-Benages* for that same proposition. Pet. App. 10a.

Leaving aside the question whether it makes any sense to consider this an abstention case merely because *Colorado River* principles may be "helpful" to the analysis, the Eleventh Circuit's decision below fails to recognize that conflating this case with *Colorado River* abstention should be the *beginning* of the standard of review analysis, not the end. That initial determination only begs the question what standard of review applies in *Colorado River* cases.

Appellate decisions on that subject are neither unanimous nor clear, but most circuits apply *de novo* review to some or all aspects of the *Colorado River* analysis. The Seventh Circuit, for example, has explained that "[i]n evaluating the propriety of the district court's decision to abstain under *Colorado River*, [the reviewing court] must first determine whether the . . . proceedings are parallel . . . . This is a legal

issue which we review *de novo*." *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 518 (7th Cir. 2001).

Furthermore, a number of the circuit courts do not limit *de novo* review in *Colorado River* cases to the "parallel proceedings" inquiry. The Ninth Circuit, for example, has stated that "[w]hether the facts of a particular case conform to the requirements for a *Colorado River* stay or dismissal is [also] a question of law which we review *de novo*." *Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1032 (9th Cir. 2005). The Fifth Circuit applies this basic approach not only to *Colorado River* review but to all abstention cases, reviewing "*de novo* whether the requirements of a particular abstention doctrine are satisfied." *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650, 652 (5th Cir. 2002).

The basic principle running through these decisions is the traditional rule that district court exercises of discretion – as in predicting whether a state court would be better situated to address a specific issue of state law – are reviewed for abuse of discretion. But district court determinations of law – such as whether another court has already decided an issue or whether the requirements of a particular abstention doctrine are satisfied – are reviewed *de novo*. In this case, the question whether the Korean court even had jurisdiction to decide the issues presented is plainly a matter of law, regardless of whether *res judicata* or abstention analysis applies.

Against this backdrop, the reason why the Eleventh Circuit got the standard of review wrong here turns out to be far larger than just this case: The Eleventh Circuit does not apply the simple principles set forth above *either* in *Colorado River* cases *or* in international comity cases. Rather, the court categorically reviews abstention decisions for abuse of

discretion without considering the nature of the specific district court determination at issue. Specifically, the Eleventh Circuit holds to the unnuanced view that "[t]he standard for reviewing a district court's exercise of *Colorado River* abstention . . . is abuse of discretion." *See, e.g.*, *Metro. Life v. Lockette*, 155 F.3d 1339, 1341 n.2 (11th Cir. 1998); *see also Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56 (1st Cir. 2005), and *Al-Abood v. Elshamari*, 217 F.3d 225 (4th Cir. 2000) (both circuits apparently sharing the Eleventh Circuit's categorical approach to *Colorado River* review). And in the case of the present international comity determination, the Eleventh Circuit found simply that "international comity . . . is an abstention doctrine" and "a district court's decision to abstain will be reversed only upon a showing of abuse of discretion." Pet. App. 10a.

In sum, although this case presents no issue of abstention, the Eleventh Circuit's abstention cases explain why that court failed to apply the proper standard of review. The reason is disturbingly systemic: Rather than looking at the nature of the district court determination challenged on appeal to determine the proper standard of review, the Eleventh Circuit relies – both here and in abstention cases – on wooden categorization. This Court should take this case to correct that systemic problem in the Eleventh Circuit and other courts taking a similar approach.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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